SUPREME COURT, U. S.

In the Supreme Court

JAN 4 1969

JOHN F. DAVIS, CLERK

OF THE

United States

OCTOBER TERM, 1968

No. 903

BAILEY'S BAKERY, LTD.,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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BAILEY'S BAKERY, LTD.,
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CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on October 17, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. A copy of the opinion

is attached hereto as Appendix A. The opinion of the District Court below on respondents' motion to dismiss the second amended complaint appears at 235 F.Supp. 705 (D. Hawaii 1964). A copy of the opinion of the District Court is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 17, 1968 (Vol. 1. Proceedings in the Court of Appeals)*. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Does the rule of this Court that appellate courts may not decide the issue of proximate cause on appeals from verdicts in jury trials based on violations of Sections 1 or 2 of the Sherman Act as declared in *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) apply to cases where the evidence shows proof of violation of the Sherman Act and the Antimerger law and the commission of acts which were intended to and which would naturally and probably affect the plaintiff's volume of sales and profits and exclude the plaintiff, a small efficient enterprise, from the market?

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*Cr. herein refers to the Clerk's record and Tr. herein refers to the trial transcript.

2. Does the rule of this Court that appellate courts may not decide the issue of proximate cause in Robinson-Patman Act cases, as declared in *Utah Pie Company v. Continental Baking Co.*, 386 U.S. 685 (1967), apply to all violations of the antitrust laws where the acts of the defendants naturally and probably erode competition and would cause the demise of small but efficient enterprises?

3. May a qualified and efficient competitor in a market where there has been an unlawful merger followed by a series of acts which would naturally cause competitors to lose sales and profits have a trial by jury on the issue of whether the unlawful merger and resulting combination of the acquirer and its operating subsidiary caused it to lose profits and be driven from the industry?

4. Whether petitioner, against whom a directed verdict was ordered by the appellate court, was improperly deprived of a trial by jury by that court when, in making a factual ruling on the sufficiency of evidence on causation it did not view the evidence as a whole, did not allow petitioner the benefit of all inferences and presumptions to be drawn from the evidence and did not resolve all conflicts in the evidence in favor of petitioner?

5. Whether the Seventh Amendment to the United States Constitution and the Federal Rules of Civil Procedure prevent a federal appellate court from reviewing the facts determinable by a jury when the trial court permitted the case to be submitted to the jury, the factual question of the sufficiency of the evidence on the question of causation was not raised by direct appeal or by a cross appeal, and there was no compliance with Rule 50(b) of the Federal Rules of Civil Procedure by the

party seeking to have the appellate court review the sufficiency of the evidence?

STATUTES INVOLVED

The statutes involved are §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 7 of the Clayton Act, 15 U.S.C. § 18, and § 4 of the Clayton Act, 15 U.S.C. § 15, Federal Rules of Civil Procedure, Rule 50(b), and the Seventh Amendment to the Constitution of the United States. These are printed and attached to this petition as Appendix C herein.

STATEMENT OF THE CASE

A. The Market Involved

The market involved is the manufacture and distribution of bread and bread-type rolls in the City and County of Honolulu. Just prior to the merger between Love's Biscuit and Bread Company (hereinafter referred to as Love's Hawaii), a Hawaiian corporation, and Continental Baking Company, effective May 7, 1960, this market was controlled and dominated by Love's Hawaii which had approximately eighty-three percent control of the market (Pl. Ex. 585, Tr. 970-972). Its sales were $5,144,000 in 1959 (Pl. Ex. 3797). The next largest competitor was the petitioner who sold approximately ten percent of the bread and bread-type rolls in the consumer market (Pl. Ex. 585; 3565). The other manufacturers of bread and bread-type rolls for resale in the market at this time were Snowflake Bakery and Quality Bakery (Id.). After

November, 1961 the market included Holsum Baking Company which acquired Snowflake in a 1960 reorganization of that firm (Df. Ex. 5130; Df. Ex. 5018). Oroweat cold-storage bread was also on the market in April, 1961[1] (Tr. 610-616). Quality Bakery ceased to be a factor in the wholesale market in 1961. It lost one-third of its wholesale sales between 1960 and 1962, from $60,000 to $41,600 (Tr. 715-719). By 1961 it had only one retail route in Oahu (Tr. 1398-1399). The petitioner here sold its factory to the Yee brothers in May, 1964 (Tr. 2884). Petitioner tried to prove that at the time of trial Bailey's, under the Yee Brothers, ceased to manufacture any breads (see Tr. 3714). Between 1960 and the time of trial there were two price increases in Honolulu (Tr. 1763). The jury, in a separate trial on "subject matter jurisdiction" (Cr. 398), found that the market involved total sales of $4,933,531 in 1961 and $5,950,000 in 1962 (Jury Verdict, Cr. 400-401). The jury also found that the market included frozen bread and rolls delivered into the county by Continental[2] and Oroweat in addition to fresh bread and bread-type rolls (Cr. 400).

Sales in the relevant market were made to retail grocery stores, branches of the United States military establishment who acquired bread products by competitive bidding, restaurants, schools and other institutions.

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[1]Oroweat bread was not manufactured in Hawaii but was shipped in cold storage containers from the mainland. It was priced at 47¢ for one lb. bread, a premium price (Pl. Ex. 3698). Oroweat did not consider itself competitive in price and volume with the local bakeries (Tr. 610, 612-613, 618, 619, 623).

[2]These products included Continental's Parker House rolls, Cloverleaf rolls and English muffins sold under the Morton's label (Tr. 3923).

B. The Parties

(a) Bailey's Bakery, Ltd.

Petitioner is a Hawaiian Corporation which commenced business in 1932 (Tr. 685-687). Its basic trade names were Piknik, a one pound sandwich loaf, and Top Hat, a one pound round top loaf (Tr. 2802-2803, Pl. Ex. 3690-3692). In 1948 the majority of its stock was acquired by Mr. Shiro Kashiwa and Mr. Fred Akohosi (Tr. 2796-97). For a long period of time its factory was located in downtown Honolulu, but in October, 1959 it acquired a favorable site in an outlying area (Tr. 2823, Pl. Ex. 508) and in April, 1962 it opened a modern factory (Tr. 2829-2830). It financed the factory with a $170,000 loan from the Frst National Bank of Hawaii (Tr. 2829-2830). Petitioner was a small healthy bakery which until 1961 sold at least approximately $400,000 of bread per year to grocery stores, restaurants and institutions (Pl. Ex. 507D, Tr. 3059). It alleged and produced evidence that it was never reasonably able to participate in the large Honolulu military business because of respondent's bidding practices (Tr. 2863). Its sales and profits for the period 1956 to 1964 are attached hereto as Appendix D, herein (P. Ex. 507D). The handwritten (italicized) figures are sales before payment of drivers' commissions (Tr. 3012, 3043-3044). Bailey's management was considered by Quentin Butler, manager of General Appraisal Co. of Hawaii, to be "seasoned operators" (Tr. 3506).

(b) Continental Baking Company

Respondent Continental Baking Company (hereinafter referred to as Continental) was incorporated in 1925 (Cr. 265). It is the largest wholesale baking company in the

United States (Pl. Ex. 517). In 1961 it had sales of $429,000,000 from 88 bakeries in 66 cities in 30 states (Pl. Ex. 557, 578A). On May 5, 1960 the Federal Trade Commission charged Continental Baking Company with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act (Fed. Trade Commission Docket No. 7880, Pl. Ex. 581 for id.). A consent order was entered into on April 2, 1962 (id).

(c) Love's, Delaware

Continental Baking Company organized defendant Love's Biscuit and Bread Co., Inc., a Delaware corporation, hereinafter referred to as Love's Delaware, on March 9, 1960, retroactive to December 26, 1959 (Pl. Ex. 524). The assets of Love's Hawaii was acquired by Love's Delaware (Pl. Ex. 524). Love's Delaware was completely controlled by the Continental Baking Company. The directors of Love's Delaware were directors of Continental (Pl. Ex. 534, 524, 538, 542, 549). Upon the creation of Love's Delaware it was then integrated into a uniform nationwide accounting system of Continental Baking Company (Pl. Ex. 3695, 818, 819, 816D, 816F, 519, 816E, 868A, 870-879, 823-833).

Pl. Ex. 870 to 879 showed Continental's billings to Love's Delaware for the general administrative expenses of Continental.

Love's basic trade name prior to the merger was Love's (Dfs. Ex. 5017).

C. The Complaints

The petitioner's original complaint was filed on January 4, 1963 (Cr. 2). After the court denied defendant's

motion to dismiss and before responsive pleading was filed an amended complaint was filed on May 17, 1963 (Cr. 23-43). Defendants again moved to dismiss the complaint (Cr. 51-97). The court granted the motion allowing twenty days to amend (Cr. 98-119; 120-122). On February 24, 1964 petitioner filed its Second Amended Complaint (Cr. 125-204). The Second Amended Complaint charged in Count I that defendants violated Section 7 of the Clayton Act in defendant's Continental Baking Company's acquisition of the assets of Love's, Hawaii (Cr. 154-155). In substance, it was alleged that Continental was the largest commercial baker of bread in the United States (Cr. 147-148) and that it acquired Love's, Hawaii which possessed 83% of the bread and bread-type roll market in the City and County of Honolulu (Cr. 131, 140). It was alleged that Love's, Hawaii had maintained its monopoly control through "Love's suffocation plan". Under this plan Love's used its power to set prices so low that other wholesalers could not exercise independent pricing but were required to sell at Love's prices (Cr. 143). It was further alleged that bid prices to the Army and Navy were so low that plaintiff and other small bakers could not bid and obtain any profit (Cr. 143). The Second Amended Complaint then alleged that the merger resulted in maintaining an entrenched monopoly power backed by the deep pocket of Continental Baking Company (Cr. 159). The complaint alleged that the merger was accomplished with the intent to control the Honolulu bread and bread-type roll business and to drive plaintiff and others out of the market (id.). It alleged twelve acts of monopolization of the market (Cr. 162-180).

These twelve acts may be summarized as follows:

1) The introduction of Magic Mix Bread in May, 1960 made by a continuous process machine. The defendants took out full page advertisements which bragged about a no hole (or no puka) bread when in fact the bread had a large hole running in it; the unfair claim that the housewife only gets all the bread paid for when Magic Mix is purchased. The bread in fact was required to be taken off the market within a period of less than six months (Cr. 162-168).

2) The introduction of thirteen varieties of bread and extensive advertising campaigns (Cr. 168).

3) The introduction, on or about March 15, 1961, of Continental's Wonder Bread label with excessive, false and misleading advertising (Cr. 169-171) and with a price below bread of like grade and quality sold in West Coast cities (Cr. 171-172).

4) The conspiracy to advertise and sell Wonder Bread in the sandwich-type loaf so as to eliminate the competition of petitioner whose largest seller was the sandwich-type bread (Cr. 172-4).

5) The false advertising of Wonder Bread as containing a special formula when in fact there was no special formula bread, which advertising was in violation of a Federal Trade Commission order (Cr. 174-175).

6) The excessive and false advertising, commencing on or about May 11, 1962 of bread known as "Soft Rolled" claiming that said bread was being rolled by an amazing machine when in fact there was no difference in its manufacture from other breads (Cr. 175-176).

7) The supplying of bread racks to stores to obtain space and shelf advantage (Cr. 176-177).

8) The manufacture of a balloon loaf in its Soft Rolled campaign and the charging of a higher price for this bread (Cr. 177).

9) The fixing of retail prices by the use of end labels on breads delivered to retailers after May, 1962 (Cr. 178-179).

10) The use of unfair methods in connection with large supermarkets such as supplying them with demonstrators and the over use of shelf space (Cr. 179-180).

11) The giving of premium prizes to the public (Cr. 180).

12) Other unfair, illegal and unlawful means (Cr. 180).

The complaint alleged as damages the loss of its business which it valued at $480,000, the loss of profits prior to the filing of the complaint in the amount of $220,000 and future loss of profits estimated at $500,000. (Cr. 188).

Count II of the Second Amended Complaint alleged that the defendants violated and were then violating Sections 1, 2 and 3 of the Sherman Act. It incorporated by reference its prior allegations contained in Count I, and spelled out violations of these sections of the Sherman Act with reference to them (Cr. 189-203).

The court, prior to trial, allowed petitioner to amend and supplement its complaint (Cr. 285-288). In particular, the order allowed petitioner to increase its claims for loss of sales and for loss of profits and to allege "that

on May 15, 1964 plaintiff sold its entire bakery business, including the equipment, building and leasehold rights to a third party at a sacrifice, suffering a loss from said sale." (Cr. 287).

D. Pretrial Rulings Below

The issues in the case were substantially limited by the trial court's rulings on defendants' various motions to dismiss. The trial court on the motions addressed to the Amended Complaint (Cr. 51, 89, 96) held that Section 3 of the Sherman Act was inapplicable even though the Hawaii State Admission Act had a two year saving clause (Hawaii Statehood Act, Public Law 86-3, March 18, 1959, 73 Stat. 4, §15; 48 U.S.C.A. Supp. pp. 59-64). The trial court held this clause was unconstitutional (Cr. 98-119).

After the filing of plaintiff's Second Amended Complaint, Continental and Love's, Delaware filed another motion to dismiss Counts I and II of the Second Amended Complaint (Cr. 204).

The trial court on September 21, 1964 rendered its decision on said motions (Cr. 230-259), 235 F. Supp. 705, Appendix B herein. (1) The decision incorporated portions of the first decision regarding the unconstitutionality of Section 15 of 73 Stat. 4, Hawaii State Admissions Act, 48 U.S.C.A. Supp. pp. 59-64 (Cr. 236). (2) With regard to interstate commerce the Court held that as a matter of law the stream of commerce of raw ingredients and wrapping materials ended upon their reaching the Honolulu bakery plants (Cr. 237-9). The Court, however, held that the allegations regarding substantial sales to Army, Navy, Coast Guard, transpacific airlines, ocean-

going ships, commercial fishermen and sales to Pacific island contractors, all buying bread for consumption outside of Hawaii, raised issues of fact as to whether or not the bread industry in Hawaii involved sales in interstate commerce (Cr. 241-2). The Court also held that the allegations concerning the sale of bread under Continental's copyrighted and highly advertised "Wonder Bread" name of itself manifested an impact of the merger on interstate commerce (Cr. 242). (3) As to plaintiff's claim under Section 7 of the Clayton Act, the Court held that a private action for treble damages does not arise from an acquisition in violation of Section 7 (Cr. 245). (4) The Court held that the merger of Continental and Love's, Hawaii, with its existing monopoly power, was not illegal per se under Sections 1 and 2 of the Sherman Act, and gave it judicial immunity by stating that Continental was free to enter the Honolulu market and that the merger did not involve competing firms (Cr. 248-249). (5) Further, the Court held that a violation of Section 2 of the Sherman Act occurs only if monopoly power was acquired by predatory acts (Cr. 247). (6) The trial court further ruled that it was not an outlawed competitive practice for a local subsidiary to agree with its nationwide parent as to what local prices should be (Cr. 254), to agree to charge lower prices in Honolulu than in West Coast cities or to use retail price end labels (under the allegations of the complaint) (Cr. 254-256). (7) The Court further held that plaintiff failed to allege that defendant lost money in its bid sales to the Army and Navy or that defendants used unfair competitive practices in securing the bids (Cr. 256). Therefore, Count I of the Second Amended Complaint was dismissed subject to the entry

of a final judgment (Cr. 262). The motions to dismiss Count II were denied subject to the aforesaid limitations (Cr. 261-262).

The Court did rule, however, that if the trial proved that defendants engaged in using excessive advertising in introducing many bread varieties solely for the purpose of foreclosing competition in the bread products market, and if these practices were made possible by Continental's deep pocket, petitioner could prevail on its claims for damages (Cr. 257-259).

In March, 1965 petitioner moved to amend its complaint to allege that Love's bid prices for Army and Navy bread contracts were below the cost of production and unreasonably low; that the defendants had violated Section 2(a) of the Clayton Act, 15 U.S.C. §13 in selling bread in Pacific Coast cities three to five cents per pound higher than in Honolulu (Cr. 328); that Love's, Delaware allowed illegal discounts to certain restaurants and certain stores on variety bread as well as buns and rolls in violation of Section 2(a) of the Clayton Act (Cr. 328-329); and that defendants gave to certain supermarkets unlawfully and in violation of Section 2(a) of the Clayton Act secret kickbacks, discounts and reductions and cooperative advertising aids (Cr. 328). On June 29, 1965 the Court denied plaintiff's motion to amend the complaint, subject to filing of an offer of proof at the time of the final pretrial conference as to the claimed discriminations among purchasers in Honolulu (Cr. 387). The Court allowed production of documents on the issue of the granting of discounts by Love's, Delaware or rebates to retailers in Honolulu (Cr. 388).

E. Final Pretrial Order

On January 11, 1966, the Court ordered a separate trial directed solely to the issue of "subject matter jurisdiction," i.e., whether or not the bread and bread-type rolls market in the City and County of Honolulu geographic market is an interstate or intrastate market within the context of the Sherman Antitrust Act. The Final Pretrial Order provided that if the jury determined that the above market is in interstate commerce, plaintiff may then proceed with its burden of proving that the acts of the defendants violated the prohibitory clauses of the Sherman Act and thereby damaged plaintiff (Cr. 398).

F. Trial

Between January 11, 1966 and February 10, 1966, jury trial was held on the "subject matter jurisdiction" aspect of the complaint.

On February 10, 1966, the jury returned a special verdict in favor of the petitioner. It determined that there was substantial interstate commerce in 1961 and 1962 but not in 1960, and determined that Oroweat bread products, Morton's frozen Parker House and Cloverleaf rolls and English muffins were in the subject matter jurisdiction (Cr. 400-401). On February 24, 1966, plaintiff made a motion that there existed substantial interstate commerce not in dispute for the year 1960. This motion was denied (Cr. 826, 829, 791). On March 2, 1966, the jury returned to determine the question of violations of the Sherman Act as limited by the Court's pretrial orders.

On April 13, 1966, the jury found on special interrogatories that the defendants did not violate the antitrust

law. The jury did not reach the issue of proximate cause or damages (Cr. 594-595) and judgment was entered accordingly (Cr. 596-598).

At the close of plaintiff's evidence, the defendants moved for a directed verdict (Tr. 4267-83). The Court reserved decision (Tr. 4281-82). The defendants made no motion for a judgment in accordance with their motion for a directed verdict under Fed. R. Civ. P. 50(b).

G. Evidence of Violations of the Antitrust Laws and Causation

(1) The Purpose of the Merger Was to Entrench Love's Monopoly Position With Continental's Nationwide Power

Direct evidence was introduced at the trial that respondent Continental Baking Company had acquired Love's, Hawaii in violation of Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act. Petitioner introduced the Agreement and Plan of Reorganization by which Love's, Hawaii was acquired and other documents showing the acquisition by Continental of Love's, Hawaii (Pl. Ex. 524, 534). It showed that at the time of this acquisition that Love's, Hawaii had 83% of the manufacture and distribution of bread and bread-type rolls in the City and County of Honolulu (Pl. Ex. 585). The evidence showed that Continental Baking Company then was the largest baking company in the United States with assets of $122,000,000 (Pl. Ex. 578A) and sales of $415,000,000 (Pl. Ex. 557). The purpose of the merger was shown to be to entrench Love's monopoly position in Honolulu. Plaintiff's Exhibit 517 consisted of a copy of a letter from A. B. Steadman, President of Love's, Hawaii to its stockholders explaining to the stockholders the

purpose of the merger. The letter, dated January 29, 1960, states in pertinent part as follows:

> "After considerable negotiation, we now have a definite offer from Continental Baking Company to purchase all of the assets of Love's for 80,000 shares of stock of Continental.
>
> Continental Baking Company is the largest bread baker in the United States. It also makes many other bakery products and has a widely diversified line of frozen foods and other food products. It is nation-wide in its operations, having plants in more than 80 cities in more than 30 States located in various points from Coast to Coast. All indications are that it is a strong and well managed company.
>
> • • •
>
> If this transaction is consummated, our stockholders would still be in the bakery business, but in addition to being in that business in Hawaii, they would be in it nation-wide with the strongest company in the bread field as well as in diversified other food products.
>
> • • •
>
> Also, a very real and tremendously serious threat is that of a large mainland company coming into the Islands on a competitive basis. Or a supermarket chain here establishing its own bakery as has happened on the mainland. Either event certainly would take away part of our business. We are geared to large scale production and the loss of a comparatively small part of our business, say one-fourth or one-third, would virtually wipe out our profit. In recent years, we know that at least three mainland companies other than Continental have studied the Hawaiian market very closely and indicated their genuine interest in Hawaii.
>
> • • •

> If Continental were in the picture as a successor to Love's, the danger of mainland competition would not be eliminated, but would be lessened because of the strength of Continental."

Mr. Steadman sent the above letter to Mr. Laughlin, President of Continental, on February 5, 1960 (Pl. Ex. 518). Continental Baking Company knew that it was obtaining a company which controlled at least eighty percent of the market (Pl. Ex. 512).

(2) Subsequent to the Merger the Respondents Engaged in Acts Designed to Entrench Love's Control of the Market

Commencing June, 1960, Love's, Delaware made special payments to Foodland, Hawaii's largest supermarket chain (Pl. Ex. 881, 3800, 3801, 3802). These checks represent a two and a half percent discount to Foodland covering the period June, 1960 to December, 1962 and amounting to approximately $700 per month. Appellants were never able to obtain the top and middle shelves for its bread at Foodland stores (Tr. 2915-2918).

Love's, Delaware immediately increased its advertising budget. Whereas in 1959 Love's, Hawaii had spent $51,000 on advertising in Honolulu, the record showed that in 1960 Love's, Delaware expended $82,000 in advertising. In 1961 its advertising expense for Honolulu was $110,961 and in 1962 $186,281. (See Final Pretrial Order, Cr. 396). These monies were used to promote 13 new varieties of bread introduced between the period 1960 and 1962. Many of the brand names used were Continental Baking Company's trade names (Tr. 1166-1173). The brands involved were Magic Mix, Bohemian Rye, Sourdough, Whole Wheat, Wonder Bread, Profile Bread,

Star's Special Diet Bread, Raisin, Chuckwagon, Roman Meal, Plantation Bread, Super-Value, Soft-Rolled and Hollywood Bread. Wonder, Profile and Plantation Bread were all introduced as Continental Baking Company, Hawaiian Region products (Pl. Ex. 1003, 1017, 1020, 1024, 1026, 1028, 1030, 1031, 1034, 1041, 1042, 1043, 1047, 1060, 1062, 1066A, 1068, 1069, 1071).

In its sales of white bread the respondents utilized false and misleading advertising. Its first trade name, Magic Mix, a Continental trade name (Tr. 1000-01), was introduced into the market on May 28, 1960 (Pl. Ex. 1003). The advertisements involved were unprecedented in kind, scope and volume in the Hawaiian bread market. (See Dfs. Exs. 5017A-5017Z; 5105-5110). Plaintiff's Exs. 1006 and 1007 show advertisements twelve by nineteen inches in the Honolulu Advertiser. See also Pl. Exs. 1005, 1008, 1009, 1010, 1011, 1017. This bread was manufactured on a continuous process machine which had been recently acquired by Love's, Hawaii. Respondents had problems with the machine and its bread came out with a hole in it. Despite the fact that this was the case respondents advertised it as "no puka" bread, contrasted with the other breads in the markets which have small holes in the texture. (See Pl. Ex. 596). Love's continued to advertise Magic Mix until June, 1960 (Pl. Ex. 1011).

In September of 1960, Mr. Orville Edwards, then General Manager of Love's, Delaware, in a letter to Mr. R. Newton Laughlin, President of Continental Baking Company, Rye, New York, stated that he planned to introduce Wonder Bread in Honolulu. This was after he had visited Continental's headquarters in Rye, New York

in December, 1960 (Pl. Ex. 3547). He asked for the production formulas and process used for Wonder (Pl. Ex. 3511). The proposed plan provided for the production of only sandwich (Pullman) type bread in a one pound variety and the round top bread in a one and one half pound variety (Pl. Ex. 3511). The bread was to be introduced February 1961 (id., Pl. Ex. 3528). The approach to be used in distributing and selling Wonder Bread was as follows:

> "e. (Approach) Wonder to be treated as though it were a new bakery in the market.
>
> f. (Shelf Space) All efforts to obtain additional space and not convert Love's to Wonder."

The advertising was to be as follows:

> "To be on the soft sell approach at the launching, when distribution accomplished and Snoflake Bakery campaign finished, we then break with a real campaign (Wonder)."

Mr. Edwards also proposed that in August when Wonder routes were launched, trucks should be printed with the Wonder design (Pl. Ex. 3511). The evidence disclosed that Wonder was placed in the market effective March 15, 1961 (Pl. Exs. 1024, 1025). At this time petitioner was Love's number one competitor (Pl. Ex. 3565). On March 4, 1961, Love's officers and managing agents met with its advertising agent, Mr. William Wright, Holst & Male, to discuss advertising copy for Wonder Bread (Pl. Ex. 623-J). It was decided that the advertising should be made to reach Caucasian households (Pl. Ex. 601-T). Petitioner's largest following was among Caucasian families (Tr. 1251). Mr. William Wright in 1961 was employed

by the advertising firm of Holst & Male and was the Love's account supervisor. At the time of trial Mr. Wright was the Executive Vice President of McCann Erickson who had acquired Holst & Male (Tr. 2460). He had studied the Honolulu market in connection with the advertising of Wonder Bread (Pl. Exs. 601-A, M, N, P, Q, R, S, and T). Mr. Wright reported to Mr. Edwards at this meeting that he had found that seventy-five percent of Bailey's sales originated from Caucasian purchasers. See Mr. Edwards' testimony at Tr. 1251 as follows:

> Q. Mr. Wright told you that he had found that Bailey's sales, approximately 75 percent, originated from Caucasian purchasers, did he not?
>
> A. I think it so states in this report, yes.
>
> Q. Following that information, you came out with copy that talked about the Mainland's most popular bread, did you not?
>
> A. Not following that.
>
> Q. Well,——
>
> A. It was part of our advertising.
>
> Q. That statement was in there, was it not?
>
> A. It's in there.

The Wonder Bread ads followed the mainland approach (Pl. Exs. 1024, 1025).

The consumer in Honolulu was not to know that the bread was in fact made by Love's and was the same bread as Love's with different wrappers on it. Thus Love's supervisor of the wrapping and shipping department, Mr. George Smith, testified that Wonder Bread and Love's Royal Bread were the same bread with different wrappers on it (Tr. 2415-2416). Despite this, the bread was advertised as containing a special formula and

as the product of Continental Baking Company Hawaiian Region (Pl. Exs. 1024-1025). Mr. Edwards admitted that there was no special formula employed in the manufacture of Wonder Bread (Tr. 1222-3). At the time of these advertisements the respondents expected Bailey's to open up a new bread factory (Tr. 2626-2628; Pl. Ex. 3565). The initial Wonder Bread advertisements were disapproved of as false and misleading and contrary to the Hawaii Drug, Food & Drug Cosmetic Act, Section 51-6 (d), RLH 1955, and Section 51-6(b) by the State of Hawaii's Food and Drug Commissioner (Pl. Ex. 3550; Tr. 1310-1318). The advertisements' emphasis on special formulas or special enrichment were deemed by Mr. Akau, the State Commissioner, to be misleading. Mr. Akau stated in pertinent part, as follows:

> "The employment of promotional schemes including false or misleading advertising or misbranding results in the consumer believing he is obtaining significant advantages by the consumption of your bread over what would be obtained from the use of other breads that conform to the standards. This scheme works a disadvantage to the competitors who adhere to the law and standards and refrain from the use of such promotional practices." (Tr. 1314).

Love's changed their Wonder Bread advertising form after receipt of this letter of complaint (Tr. 1319). Love's continued to advertise Wonder Bread until October, 1961 (Pl. Exs. 1024, 1030, 1046, 1048, 1049, 1055). Plaintiff's sales suffered during this period of time and plaintiff fell below its break-even point in September, 1961 (Tr. 2882).

In November, 1961, a new bread appeared. It was advertised and distributed in Hawaii by Holsum Hawaii.

This was a successor corporation to Snowflake Bakeries. Snowflake's owner, Mr. Larry Dolim, had interested West Coast people, connected with Holsum, to enter the Hawaiian market through his Snowflake Baking Company (Df. Exs. 5130, 5018-L). Holsum introduced "Sof-Twist" Bread (Df. Ex. 5018).

Sof-Twist was produced in a regular and balloon loaf. A balloon loaf only weighs a pound but is baked in a larger pan and therefore gives the appearance of being a larger loaf than a one pound loaf (Pl. Ex. 3613). The balloon loaf was priced by Holsum and later by Love's to sell for more than the one pound loaf (id.) Following the introduction of Sof-Twist, respondents, beginning in December, 1961 (Tr. 1415), produced a balloon loaf bread made on the continuous mix machine which was labeled "Super Value" (id.).

In January of 1962, Mr. MacNary, Continental's Vice President, visited the Islands (Tr. 1412; Pl. Ex. 3613). With this visit defendants organized their plans to come out with what they claimed was a new bread, "Soft-Rolled", to compete with Holsum. Holsum's position and space was to be controlled (Pl. Exs. 3009, 3624; Tr. 1459). The advertising of Love's was false and misleading (Pl. Exs. 1062, 1063, 1064, 1066, 1066A, 1068, 1069). There is no distinction between Love's regular enriched bread and Love's "Soft-Rolled" bread (Tr. 2417). Defendants embarked on an unfair and unethical advertising campaign by which they took a name similar to Holsum's "Sof-Twist" and countered Holsum's advertising which showed that Holsum twisted two smaller dough parts prior to baking (Tr. 1417-1419). The name "Soft-Rolled" as well

as its advertising would give one the impression that defendants were using some sort of new process which other bakers were not using (Tr. 2898-2901). In fact defendant's "Soft-Rolled" was produced on a regular cross-grain molding machine and no new process was utilized (Tr. 2417).

Love's Sales Manager, Mr. Turner, called a general meeting on November 28, 1962 (Dfs. Ex. 5123). Mr. Turmer stated at the meeting that: "Then we hit with our Soft-Rolled campaign . . . over the last 28 weeks we have cut Holsum to their knees." During this period of time Love's management had placed a large 8′ by 4′ sign in the meeting room stating "Smash Holsum" (Tr. 1991). During the aforesaid meeting, Mr. Turner pounded a loaf of Holsum bread with a wooden mallet (Tr. 1909).

Mr. Turner admitted that Mr. MacNary of Continental came to Hawaii to discuss sales (Tr. 1907). He admitted that by November, 1962, Love's had "cut Holsum to their knees" (Tr. 1912-1913; 1992; Dfs. Ex. 5123). He testified that Love's had "stopped" Holsum, definitely by November, 1962 (Tr. 1993).

On October 11, 1962, Love's placed a braggart's advertisement in the newspapers. It stated that it would take 17.5 Honolulu stadiums to hold all the people who are enjoying Love's "Soft-Rolled" bread (Pl. Ex. 1068). The Honolulu Stadium capacity was approximately 23,000 people; 17.5 stadiums would constitute 402,500 people out of a population of 508,000 (Tr. 1487-1490; Pl. Ex. 585). This ad thus shows that Love's possessed over 80% of the market (Pl. Ex. 3820).

Thus, during most of the period 1960–December, 1962, Love's maintained an excess of 80% of the wholesale market of bread and bread-type rolls in Honolulu. Holsum, Hawaii had a $377,000 deficit as of March, 1963 (Defs. Ex. 5130).

(3) The Military Market Was Monopolized by Love's

In 1960 Love's was making bids to the military at the price of 11.5¢ and 12.5¢, one pound white. In 1961 it was bidding 13.5¢ and 14.5¢. In 1962 it was bidding 13.5¢ (Pl. Exs. 2005, 2006). Plaintiff was unable to bid because of these prices (Tr. 2862-3). It was learned at the trial that Love's utilized a lean formula bread in bidding to the military (Tr. 2433). The petitioner here would not have bid any other than its standard formula bread (Tr. 2875-2876).

(4) Excluded Matters

Petitioner offered to prove that Love's gave discriminatory prices to favored restaurants in Honolulu and that this interfered with petitioner's ability to sell buns and rolls to the restaurant trade. See Pl. Ex. 880 for Id. stricken (Tr. 3581). The Court did not allow the petitioner to show that the Love's bid prices to the Army and Navy were below its costs (Cr. 376-380; Tr. 3163-76).

The Court rejected plaintiff's offer of proof that the defendants were in violation of Section 2(a) of the Robinson-Patman Act in the wholesaling of Wonder Bread at lower prices in Honolulu as contrasted with major cities on the West Coast (Tr. 2878-2880).

The Court also prevented the introduction of direct evidence that the advertising of Wonder Bread was spe-

cifically programmed to take away Bailey's customers. These direct admissions were contained in Plaintiff's Exhibits for Identification 601-B to 601-L. This evidence was disallowed on the basis that it was a report of an advertising agent which was not adopted by Love's (Tr. 1229, 2502).

The Court refused to allow in evidence the Federal Trade Commission Consent Order in Docket No. 7880 against Continental Baking Co. (Tr. 2753-2755).

(5) Petitioner Lost Profits and Was Finally Eliminated from the Market

Petitioner's profit and loss statements for the years 1956 to 1964 were admitted into evidence as Plaintiff's Exhibit 507-D, Appendix D herein. Its balance sheets for the years 1948 to 1964 were admitted into evidence, Pl. Ex. 560-B. Its sales as reported for excise tax purposes covering the period 1958 to 1963 were admitted into evidence as Plaintiff's Exhibits 986 and 986-A. The Court limited plaintiff's profit and loss reports or studies to the period from 1956, although petitioner had offered its profit and loss statements from the period 1948 to 1964, Pl. Ex. for Id. 507-B. This evidence discloses that plaintiff's sales went below $400,000 in 1961 and by September, 1961, were below the break-even point (Tr. 2882). Plaintiff suffered a $15,000 loss in 1961, an $80,000 loss in 1962 and a $50,000 loss in 1963 (Appendix D herein). The serious losses in 1961 and 1962 caused its officers to decide to sell the plant in September or October, 1962 (Tr. 2883). The plant was finally sold, effective May 15, 1964, at a $40,500 loss to the Yee Bros. who organized Bailey's Bakery Products, Inc. (Tr. 2884, 3061).

H. Errors Raised to the Court of Appeals for the Ninth Circuit

The points on appeal raised to the Court of Appeals for the Ninth Circuit were assertions of prejudicial instructions to the jury and prejudicial exclusion of evidence. The summarization of the major rulings of the trial court alleged by the petitioner to be erroneous in the Court of Appeals is attached hereto as Appendix E.

I. The Appellate Opinion

The learned Court of Appeals below held as a matter of law that the case should not have been submitted to the jury because the evidence could not support a jury finding that respondents' violations of the antitrust laws caused petitioner's injury.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT BELOW IMPROPERLY USURPED THE JURY FUNCTION AND DECIDED ISSUES OF FACT IN VIOLATION OF AMENDMENT VII OF THE U. S. CONSTITUTION AND SECTION 4 OF THE CLAYTON ACT.

A. The decision of the court below is in direct conflict with Story Parchment Paper Co. v. Paterson Parchment Co., 282 U.S. 555 (1931); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1961); Utah Pie Company v. Continental Baking Co., 386 U.S. 685 (1967).

1. That respondents violated § 2 of the Sherman Act to the injury of the petitioner. Respondents used their combined power to destroy competition and had such destructive intent in violation of § 2 of the Sherman Act.

The jury verdict below did not reach the issue of proximate cause (Cr. 595). It found only that respondents had not violated Section 2 of the Sherman Act. But this ver-

dict was the result of erroneous charges to the jury which called for, in effect, a directed verdict on violation (Appendix E herein). The Court's instructions appear at Tr. 4969-5040.

The major errors of the trial court in its instructions were:

1) To immunize the merger between the respondents Continental and Love's, Hawaii as a matter of law and as a matter of factual consideration by the jury (Tr. 5001-5005, 5022; Cr. 243-245).

The instruction given at Tr. 5022 was as follows:

> "For the purpose of this case, standing by itself, it was not unlawful for Continental to have caused the acquisition by Love's Delaware of the assets of Love's Hawaii; that is, as the plaintiff argued, brought about a merger of Love's Hawaii and Continental. That is not unlawful, standing alone. And similarly, standing alone, it is not unlawful for Love's Delaware to continue to hold and own the assets of Love's Hawaii.
>
> "Furthermore, it is not unlawful for Continental to own 100 percent of the stock of Love's Delaware. While the simple fact of acquisition or merger was not unlawful in itself, yet if you find that the plaintiff has proved by a preponderance of the evidence that the acquisition was made for the purpose of or in furtherance of any conspiracy of the parties to monopolize, or an attempt of the parties to monopolize, or resulted in monopolization of the bread and bread-type rolls market in Honolulu, then the acquisition would therefrom and thereby become unlawful. Nevertheless, as I say, the fact of acquisition or merger itself is not proof absolute that a conspiracy

or attempt of monopolization or actual monopolization took place in the market."

2) To fail to grant any legal significance to the monopoly power held by the respondents (Tr. 5010-5013, 5015).

3) To state at length that the Sherman Act guaranteed only competition and that a small businessman is not entitled to an unchanging status quo regardless of the size or power of any competitor in the market (Tr. 4990-4993).

4) To fail to render instructions based on the judgment in *F.T.C. v. Continental Baking Co.* (Pl. Ex. 581 for Id.). Petitioner's proposed instructions are attached hereto as Appendix F. (See Tr. 4460-4461).

The jury verdict was further a result of the Court's exclusion of evidence that defendants adopted an advertising campaign in the introduction of Wonder Bread which was specifically aimed at Bailey's large sales to Caucasian customers (Pl. Exs. for Id. 601-B to 601-L).

The court below was required to determine whether or not prejudicial error was committed at the trial.

Respondents clearly violated the antitrust laws to the injury of the petitioner. There is, it is respectfully submitted, no lack of substantial evidence that respondents proximately caused petitioner to lose sales and profits and excluded it from the relevant market. The respondents violated Section 7 of the Clayton Act and Section 2 of the Sherman Act in their merger. Monopoly power was wilfully maintained by merger. *United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945);

United States v. Grinnel Corp., 384 U.S. 563 (1966). Respondents then conspired to maintain monopoly power following the merger in violation of Section 2 of the Sherman Act. *American Tobacco Co. v. United States,* 328 U.S. 781 (1946). At the time of the filing of the complaint in this case in 1963, respondent Love's, Delaware had held 80% of the relevant market, which constituted monopoly power. *United States v. Aluminum Co. of America,* supra. That monopoly power was in violation of Section 2 of the Sherman Act. It was a successful result of an agreement to use the combined economic power of each respondent to maintain monopoly control of the bread industry in the County of Honolulu with its interstate commerce. *United States v. Grinnel Corp.*, 384 U.S. 563 (1966). There is no issue of lack of evidence of proximate cause because the respondents maintained monopoly power in part by excessive[3] advertising campaigns which were manifestly devoted to obtaining the transfer of sales from their competition to themselves. This was bound to affect the small competitor in his ability to compete with respondents. *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967). See also testimony of Quentin L. Butler, an expert appraiser (Tr. 3511-3512). The under-the-table payments by Love's to Foodland were in violation of Section 2(a) of the Robinson Patman Act and were substantial. Respondents had their racks in vir-

[3]The advertising budgets on 1960, 1961 and 1962 were excessive compared to the pre-1960 advertising and the size and number of the advertising copy. Petitioner sought to prove that Love's Delaware, indeed, lost money in the relevant period, but its motions to obtain reliable accounting information were opposed by Continental Baking Co. and sustained by the Court (Cr. 775, 307, Item 12, Cr. 341, Cr. 834, 843). This was alleged to be erroneous in the Court below.

tually all of the grocery stores in Honolulu on condition that they obtained preferred space (Tr. 1460, 1103-4). The large losses of sales and profits which Bailey's experienced were causally related to these activities. These advertising campaigns involving Wonder Bread, Magic Mix and Soft-Roll were conspiratorial. The defendants used Continental's trade names and Continental's deep-pocket position to advertise Love's bread.

The evidence produced here further showed that the defendants had the intent to take away Bailey's Caucasian customers and "smash Holsum." (Pl. Ex. 3565, Tr. 1251, Ex. 1024, 1025, Dfs. Ex. 5123, Tr. 1909-1912). This court has consistently held that substantial evidence of a purpose to exclude followed by loss of sales and profits and resulting in elimination from the industry in Section 2 Sherman Act cases presented a factual issue of proximate cause which must go to the jury. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946); *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1961). Cf. *Utah Pie Company v. Continental Baking Co.,* 386 U.S. 685 (1967). Clearly petitioner is entitled to a jury determination on the issue of proximate cause. Congress has protected this petitioner from what occurred in the Honolulu market. It was not fair game for an unlawful merger followed by concentrated and extensive use of the economic power of the combination shown here. It can never be said that monopoly power was thrust upon respondents. *United States v. Aluminum Co. of America,* 148 F.2d at 431. The merger here brought about the exclusion of Bailey's (Tr. 2884) and Quality Bakery from the relevant market (Tr. 715,

719, 1391, 1398-99, 1970-71). It was for the jury alone to determine, based upon the relevant decisions of this Court, whether petitioner's decline in volume of sales and profits and final demise was attributable to the combination and conspiracy which preceded it.

2. The merger violated Section 7 of the Clayton Act as well as Section 2 of the Sherman Act.

The merger violated Section 7 of the Clayton Act.[4] The purpose of the merger was to entrench the monopoly position of Love's, Hawaii, to create a barrier to the entrance of new firms and to enhance the competitive position of Continental throughout the country. Pl. Exs. 517, 518, 512 and Pl. Ex. 581 for Id. establish that Love's, Hawaii, a holder of monopoly power, was acquired by the nation's largest manufacturer of bread and bread-type rolls, a manufacturer who had succeeded, at the time of the merger, in increasing concentration in the manufacture of bread and bread-type rolls in the United States and who had substantially lessened actual and potential competition throughout the country in that industry. Petitioner thus showed by direct evidence a merger whose purpose was to maintain monopoly control of the relevant market and to enhance Continetal's competitive position throughout the country. Whether this merger, standing alone, would have caused petitioner injury was not

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[4] *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). The practices engaged in by respondents after the merger produced the results which were predictable at the time of the merger. Here as in *Procter & Gamble* a monopolist was acquired by the nation's leading manufacturer of bread and bread-type rolls who had the power to engage in extensive advertising campaigns. The effect of the merger clearly "may be substantially to lessen competition" and "tend to create a monopoly."

before the court below because the record showed that the respondents engaged in a conspiracy and committed acts pursuant to it which combined the financial power and resources of Continental Baking Co. with Love's already dominant position to drive out competition. Large scale, massive advertising compaigns were utilized. They were intended to and thereby did have an impact on actual competition in violation of the purposes of the antimerger law. The antimerger laws are aimed at preventing the elimination of the small businessman by such methods. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Federal Trade Commission v. Procter & Gamble Co.*, supra.

3. Proof of defendants' intent to exclude him is sufficient for the plaintiff to obtain a judgment under Section 4 of the Clayton Act that his exclusion was caused by defendants.

The merger here was made for no other reasons than to forestall and prevent competition in the relevant market, and to enhance the competitive position of Continental throughout the country. (Pl. Ex. 517, Pl. Ex. 581 for Id.). The acts and activities which followed were enacted with such intent. An intent to maintain monopoly power by those holding monopoly power presents a case for the jury when competition is excluded. The monopolistic intent casts light on all subsequent acts which naturally and probably had contributed to the desired aim. The Wonder Bread sandwich loaf campaign was aimed at Bailey's. (Tr. 2802, 1251, 2626-2628, Pl. Exs. 1024, 1025).

The situation before this Court in *Continental Ore*, supra, was the same as involved in this writ. There, a

jury verdict was given to the defendant. The plaintiff claimed that the court erred in its instructions to the jury and in the exclusion of evidence. The defendants did not seek in the trial court to have a judgment entered on the ground that there was no possible connection shown between violation of the antitrust laws and the injury. On appeal, the learned court below ruled that evidence of violation of Section 2 of the Sherman Act was not sufficient to allow the case to be decided by the jury because there was not substantial evidence of causation. This Court granted a writ of certiorari and reversed the Ninth Circuit ruling that there was insufficient evidence on the issue of causation to go to the jury. The only conceivable distinction between *Continental Ore* and this case is that in *Continental Ore* there was a showing of direct dealings between the injured plaintiff or its sources of supply and the defendants. But it is respectfully urged that this distinction is not material. This is made clear by this Court's opinion in *Utah Pie Co. v. Continental Baking Co., et al.*, 386 U.S. 685 (1967). There, as here, the defendants engaged in conduct which violated the standards of competition set forth by the United States Congress. In that case Section 2(a) was raised, whereas here not only 2(a) is raised with respect to the Foodland payoffs but violations of Section 2 of the Sherman Act and Section 7 of the Clayton Act are shown. The Tenth Circuit in the *Utah Pie* case, 349 F.2d 122, ruled that the plaintiff's verdict should not have stood because there was insufficient evidence to support a finding of probable injury to competition within the meaning of Section 2(a). In *Utah Pie* there was no showing of any refusal to deal or predatory acts aimed at sources of supply. Rather the issue

was simply one of whether or not violation of a Congressional standard and its natural and probable injurious impact could go to the jury. This Court reversed and ruled that there was sufficient evidence to support the determination of liability based on a violation of Section 2(a) of the Clayton Act. This Court noted that proof of intent to destroy a competitor is substantial evidence of the destruction of competition. 386 U.S. at 696, n. 12. Petitioner asserts that here, as in *Utah Pie,* the jury is to determine whether violations of the statutory standards produced injurious consequences.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE PURPOSES OF THE ANTITRUST LAWS.

A. The result below will prevent or seriously hinder private enforcement of the antimerger law.

1. The court below is following a course of decision making which has been repudiated by this Court.

Plaintiff below was required to try first the issues of the revelant market in which the jury was to arrive at dollar volume figures. Having proven that the relevant market was in interstate commerce, there was little question of the violation of the antitrust laws involved. The trial court, however, rendered erroneous interpretations on the law of evidence and on the antitrust laws. Petitioner found itself facing restrictive rulings which excluded direct evidence of respondents' intent to use their Wonder Bread advertising campaign to exclude petitioner from the market[5] (Pl. Exs. 601B-610L, for Id., Tr. 1229,

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[5]Defendants requested Holst & Male to prepare advertising recommendations for the introduction of Wonder Bread (Tr. 2463-2465, 2487). It was done. Pl. Ex. 601 is the result of this effort.

2502-2503, 623D, E, G, H, I for Id., Tr. 2494-2501, 2503-2505). The full scope of defendants' devices to control the bread market were never given to the jury, i.e., below cost selling to the military (offer of proof, Tr. 3163, 3176; Pl. Ex. 3383 for Id.), the scope of the Robinson Patman Act in outlawing Love's payments to Foodland (See Tr. 5025), the selling of Wonder Bread in Honolulu at lower prices than in West Coast cities (Tr. 2878-2879), and the discriminatory discount policies in the sale of buns and rolls to the large restaurant owners (Pl. Exs. 3681, 881 Stricken, Tr. 3581, 3577-3578). It did not receive the benefits of Section 5(a) of the Clayton Act, 15 U.S.C. § 16A. This was error. *Carpenter v. Central Arkansas Milk Producers,* 1966 Trade Cases, para. 71,817 (W.D. Ark); *Y & Y Popcorn Supply Co. v. ABC Vending Corporation,* 263 F. Supp. 709 (E.D. Pa. 1967); cf. *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311 (1965). The instructions of the trial court were replete with error. The objective of Section 7 of the Clayton Act to protect the small businessman from elimination through monopolistic pressures of large combinations which use mergers to grow ever more powerful was never told to the jury. Rather the jury was told, to the contrary, that the small mom and pop store must compete or die, regardless of the power or size of the

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This report was the subject of discussions by the officers and managers of Love's on March 4, 1961 (Pl. Ex. 623 for Id.; Tr. 2488, 1251, Pl. Ex. 601 for Id.). This was the best evidence of what was discussed at the meeting of March 4, 1961 (Pl. Ex. 623 for Id.). Since Wonder Bread was advertised thereafter in the manner indicated, the report was adopted by Love's. It should have been admitted into evidence. *Continental Baking Co. v. United States,* 281 F.2d 137 (6th Cir. 1960); *United States v. ESCO Corp.,* 340 F.2d 1000 (9th Cir. 1965); cf. *Continental Ore Corp. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962).

competitor (Tr. 4990-4993). Petitioner was required to assume a burden of proof which was not properly its burden. At the very least, respondents should have been required to justify their monopoly power. *Aluminum Company of America v. United States,* 148 F.2d 416 (2d Cir. 1945). Congressional purposes to prevent the elimination of the small efficient firm by unlawful merger has been defeated by per curiam affirmance of a trial record fraught with error. *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966). Violation of the antitrust laws ought not to produce victories based upon complete disregard by respondents of the antimerger statutes followed by excessive advertising campaigns, disclosed purpose to monopolize and disclosed intent to exclude Bailey's. What occurred below, then, is precisely what this court declared in *Continental Ore Co., supra,* should not have occurred. Apparently the court below dismembered the evidence, viewed it separately, bought at face value respondent's arguments that petitioner was a small firm who could not withstand modern advertising techniques. This argument assumes that there is no antimerger law, no antitrust law, and that advertising standards of fairness are irrelevant to the antitrust laws. What Continental could have done separately in advertising its products as a competitor to Love's it could not do in combination with Love's. Respondents could not maintain monopoly power by false advertising. Congress has given this petitioner protection from the conduct in this record. It is significant that petitioner had the best-tasting bread in the market, straight dough bread. It had a steady assured market in the Honolulu area by reason of its quality product (Tr. 2400-2409). The sponge dough bread manufactured by the

defendants is considered to be a softer, less tasty bread than that manufactured by petitioner (Id.). Manufacturers of bread are spending millions of dollars to simulate a straight dough bread (Tr. 2447). Excessive, false and unethical advertising, under the table payments and discriminatory tactics caused the diversion of petitioner's customers. But a merger resulting in a combination of nationwide trade names, excessive advertising, and unethical advertising maintained by a monopolist cannot lawfully divert those sales as long as the antitrust laws exist. *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

2. The Ninth Circuit's per curiam affirmance of the judgment below resulting in nonenforcement of the purposes of the antimerger law is in conflict with the Fifth Circuit.

A private party should be allowed instructions based on the antimerger law in a Section 2 case based on violation of § 7 of the Clayton Act. The purposes of Section 7 and the presumptive unlawfulness of the merger here should have been told to the jury. Private actions asserting and proving liability based upon illegal mergers are needed to implement congressional policy. The court below is in conflict with the Fifth Circuit, *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967) in not granting petitioner the protection of Section 7 of the Clayton Act.

III. THE OPINION BELOW CONFLICTS WITH A JUST AND REASONABLE INTERPRETATION OF THE RECORD ON THE ISSUE OF CAUSATION AS REQUIRED BY THIS COURT.

A. The record showed petitioner was a business capable of sustained sales and profits during the period 1956 to 1960 but that following the merger there was a resulting loss of sales and inability to stay in the market.

Appendix D, Pl. Ex. 507D clearly shows a diminution in sales and profits following the effective date of the merger between Continental Baking Company and Love's, Hawaii. Only the jury under our Constitutional system is allowed to determine whether or not a loss of sales and profits and the ultimate leaving of the industry by the plaintiff was the result of the acts of the defendants.

The defense that other factors caused the demise of petitioners was mere sham and unconvincing. In the trial and their brief below respondents made such a claim. They attacked Bailey's delivery equipment and lack of large scale advertising. But Bailey's had maintained a steady volume of business and maintained profits with its method of bread delivery (Pl. Ex. 507D), and had a steady clientele. It put its money in a new plant and equipment. In 1962 it did spend $24,000 in advertising (Id.). Respondents are attempting to use their own excessive spending as a bootstrap argument to justify such spending.

Appellees claimed that Bailey's "never competed for any of the military contract business both because it lacked the necessary production and delivery equipment, and also because it did not want to subject itself to federal wage and hour legislation" (Brief of Respondents, below, at p. 8). The simple fact is that it did not compete for military contract business because Love's bid

prices were unreasonably low (Tr. 2862, 2865). Bailey's would never have thought of the practice of using a lean formula bread in military bidding (Tr. 2433, 2875-2876).

IV. THE DECISION BELOW IS IN CONFLICT WITH THE SEVENTH AMENDMENT TO THE CONSTITUTION.

A. Where the issue of sufficiency of evidence is not properly raised by appeal from a determination of the trial court an appellate court may not enter final judgment based on its interpretation of the facts presented to a jury.

1. The decision below is in conflict with the Fifth Circuit.

Petitioner respectfully urges that the procedure adopted by the court below is in basic conflict with the Seventh Amendment of the Constitution.

The court below assumed the power to review a judgment after the issue of causation had not been decided by the jury and even though this issue had not thereafter been raised by respondents. Without a ruling by the trial court, without a cross appeal, without specification of error on the factual issue of causation, the appellate court reviewed the evidence and affirmed the judgment. Appellate courts can review facts only after the trial court has made rulings on them as a matter of law and only after such issues have been raised by proper motion or appeal. *Parsons v. Bedford,* 3 Pet. 433, 7 L.Ed. 732 (1830); *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76 (1891).

In *Baltimore & Carolina Line v. Redman,* 295 U.S. 654 (1935) and *Galloway v. United States,* 319 U.S. 372 (1943) this Court upheld the right of a trial court to direct a verdict on the grounds of insufficiency of evidence. In

these cases there was a prior ruling by the trial court determining the sufficiency of the evidence. An appeal based upon this ruling as to a matter of law was then taken to the Appellate Court. The Appellate Court then decided whether or not the ruling was correct as a matter of law.

In *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389 (1937) this Court held that where there was no motion for a judgment notwithstanding the verdict the Appellate Court had no jurisdiction to decide that question. Similarly in *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212 (1947) it was held that where there was no timely motion under Rule 50(b) and an appeal asking only for a new trial it was error for an appellate court to decide issues properly raised by a 50(b) motion. The *Cone* case was followed by *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (1948) and *Johnson v. New York, N.H. & H. R. Co.,* 344 U.S. 48 (1952) which emphasized the necessity for strict conformity to Rule 50 as a prerequisite for an appellate court to enter judgment for a defendant following a verdict for the plaintiff.

In the case at bar the trial court was initially faced with motions for a directed verdict based upon sufficiency of the evidence on the issue of proximate cause but reserved its final ruling (Tr. 4281, 4282). The case was submitted to the jury and judgment entered on the jury verdict finding no violation of the antitrust laws. No ruling of the trial court was thereafter sought and no appeal from any ruling addressed to the sufficiency of the evidence was taken by respondents. Petitioner was not apprised of the fact that the issue of lack of evidence

of proximate cause was to be urged until respondent's answering brief was filed. The resulting prejudice is clear. Petitioner's opening briefs were devoted to the issues raised by its appeal. Its discussion of the questions as to sufficiency was limited to a short and limited reply brief.

It is submitted that the appellate court would not, under the Seventh Amendment to the Constitution, review facts and find lack of substantial evidence of causation without having before it an appeal from a ruling of the trial court on the sufficiency of the evidence. The court below has erroneously usurped the function of the jury to sit as a trier of fact and determine factual issues properly determinable by the jury. It has not passed as a matter of law on any rulings by a trial court. Its action was thus in direct conflict with *Thurber Corporation v. Fairchild Motors Corporation,* 269 F.2d 841 (5th Cir. 1959), a case in which the court discussed and ruled against the procedure adopted here.

It is respectfully submitted that the federal rights granted petitioner by Congress have been erroneously denied to it. A decision which negates Congressional purposes in the enactment of the antimerger law and the Sherman Act should not prevail.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Dated, December 1, 1968.

Respectfully submitted,
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Appendix A

United States Court of Appeals
for the Ninth Circuit

Bailey's Bakery, Ltd., Appellant, vs. Continental Baking Company and Love' Biscuit and Bread Co., Inc. Appellees.	No. 21,163

[October 17, 1968]

Appeal from the United States District Court
for the District of Hawaii

Before: Browning and Ely, Circuit Judges, and
*von der Heydt, District Judge

Per Curiam:

This is a private action for treble damages under the Clayton Act and the Sherman Act. The case was tried before a jury, which returned verdicts in favor of appellees.

Appellant urges numerous assignments of error, some 135 in all, a small number of which were actively pursued. We have examined the record and the briefs of the parties. Considering the record as a whole, we conclude that there was insufficient evidence that any loss which appellant sustained proximately resulted from illegal activity on the part of the appellees to justify submission of this issue to the jury.

The judgment is affirmed

*Honorable James A. von der Heydt, United States District Judge, Anchorage, Alaska, sitting by designation.

Appendix B

In the United States District Court
for the District of Hawaii

Civil No. 2113

Bailey's Bakery, Ltd.
(a Hawaiian corporation),
Plaintiff,

vs.

Continental Baking Company (a Delaware corporation), and Love's Biscuit & Bread Co., Ltd. (a Delaware corporation),
Defendants.

DECISION ON SUFFICIENCY OF PLAINTIFF'S SECOND AMENDMENT COMPLAINT

This is the second round of this civil antitrust suit. In the first round, this court dismissed the complaint as not pleading facts sufficient to state a cause of action, but granted plaintiff leave to amend. Plaintiff's Second Amended Complaint was countered with defendants' motion to dismiss for failure to state a claim upon which relief can be granted, and an alternate motion to strike the complaint in its entirety. This court was sorely tempted to grant the motion to strike on the ground that the complaint was too long—78 pages—and so full of immaterial facts and conclusory statements that it was objectionable under Rule 8, F.R.Civ.P.

Frankly, it was largely out of compassion and patience, that this court did not grant the motion to strike, and this court's refusal to do so must not be taken by the plaintiff, or by any other plaintiffs in any future case, as a precedent. That this court's decision on defendants' motions has been so delayed is in a very large measure due to the prolixity of this amended complaint. If faced again with a similar pleading, it is more than highly probable that a motion to strike would be granted.

Having reluctantly undertaken the burden of ruling on the sufficiency of this Second Amended Complaint, defendants' motion to strike based on Rule 8, is DENIED.

This second amended complaint contains two counts. Count I: an allegation that the outright purchase in March of 1960 by defendant Continental Baking Company (Continental) of Love's Biscuit & Bread Co., Ltd., a Hawaiian corporation (Love's Hawaii), and the formation of a Delaware corporation of the same name (Love's) to take over all of the assets of Love's Hawaii, and the actions of the defendants thereafter, violated and still violate Section 7 of the Clayton Act; and Count II: allegations that the defendants have violated and are now violating Sections 1, 2 and 3 of the Sherman Act. Plaintiff asks treble damages under each count.

After winnowing the kernels from the mass of straw and chaff of the complaint, the material facts alleged in Count I are:

(VI) Continental is one of the largest baking companies in the United States and carries on an interstate baking business.

(VII) Prior to its sale to Continental, Love's Hawaii had acquired a monopoly (83%) of the total bread and bread-type rolls market in the City & County of Honolulu, while plaintiff had about 10% of that market. About 99% of the ingredients which go into the manufacture of bread and bread-type rolls and bread wrapping materials and baking equipment are imported from the mainland to Hawaii, and thus flow in interstate commerce into the several bakeries in Hawaii.

(VIII) The raw materials and wrappings were manufactured into bread and bread-type rolls and sold wholesale in the City & County of Honolulu geographic market area, and the ultimate consumers of the bread and bread-type rolls sold in the Honolulu market were persons in Honolulu, including tourists passing through; also, ships in commerce bought the same when they called at Honolulu; the U. S. Navy and Coast Guard ships sailing out of Honolulu bought the same for consumption aboard and delivery to Pacific islands under United States control; commercial fishermen fishing in international waters bought the same; airlines purchased the same for consumption in interstate flights; contractors on Pacific islands also bought the same for their operations.

Further, (IX) five bakeries in Honolulu, including the plaintiff and defendant Love's Hawaii, competed in the bread and bread-type rolls market at the wholesale level in the City & County of Honolulu. For many years prior to March 1960, Love's Hawaii had a monopoly (83%) of the bread and bread-type rolls market in Honolulu and because of such monopoly power, possessed the power and ability to set and control prices of the products in

the Honolulu market and to restrict competition therein. Competing bakeries were forced to follow the prices set by Love's Hawaii because Love's Hawaii prices were so low that the plaintiff and other competing bakeries could not undersell nor price higher than Love's Hawaii and still stay in business. Prices set by Love's Hawaii during the 10-year period before March 1960 were lower than corresponding prices for like products in Pacific coast cities, in spite of the ocean shipping costs. On Army and Navy purchases, Love's Hawaii bid lower than its wholesale prices and plaintiff and other bakers could not meet Love's Hawaii's bid prices. Love's Hawaii intentionally held its bid and wholesale prices down to a minimum to keep out mainland competition.

Also, (X) Continental is the largest bread bakery corporation in the United States, running its entire chain of bakeries as a total enterprise, with its many subsidiaries operating as an integrated unit throughout the United States, and selling its bakery products in interstate commerce, with Continental controlling the standards of production of subsidiaries, the nature and extent of repairs to plants, personnel policies, and monies collected and spent by its subsidiary bakeries. Continental and Love's were therefore engaged in commerce in its Hawaii-Pacific area operations as part of its nation-wide operation, and Continental is subject to the jurisdiction of the Federal Trade Commission.

(XI and XII) In March 1960, Continental acquired Love's Hawaii with the intent of continuing on the low prices of Love's Hawaii and preventing possible mainland competition in Hawaii, and eliminating small bakeries.

(XIII) The acquisition of Love's Hawaii by Continental was illegal and unlawful under Section 7 of the Clayton Act, and the effect of the acquisition may have, or did, substantially lessen competition by strengthening the existing monopoly of Love's Hawaii and directly affecting interstate commerce, both in interstate commerce in raw materials going into bread and bread-type rolls and the bread and bread-type rolls market in the Honolulu market area.

Further, (XIV and XV) immediately after the purchase of Love's Hawaii, the defendants continued to carry on Love's Hawaii's low price ("Love's suffocation") plan with the intent to restrain mainland baking companies from possibly coming into the Honolulu market, and supermarkets from establishing their own bakeries, as well as to eliminate local competition.

(XVI) To increase their dominance of the Honolulu market, Love's carried out an extensive advertising program and continued to sell its bread and bread-type rolls at prices lower than that for comparative products on the Pacific coast. Between March 1960 and May 1962, Love's introduced 13 new varieties of bread into the Honolulu market, accompanying each new introduction with expensive advertising. (P.38)

The next six pages of Count I of the complaint are taken up with the allegation that in March 1961 Continental introduced its Wonder loaf into the Honolulu market and that in connection therewith, Love's and Continental conspired to put out its Wonder loaf as a sandwich-shape loaf so as not to compete in the "round top market of bread" in the Honolulu market. The sand-

wich-shape Wonder loaf was directly aimed at the plaintiff, in that it was the leading producer of the one-pound sandwich loaf. (It was only by studied reading of the complaint that this court could finally determine that the Wonder Loaf was made and baked by Love's here in Hawaii.)

Moreover, (P.47) by printing the retail price on its bread, the defendants forced the retailers to sell the bread at that price, and the defendants were thereby fixing the minimum retail price of the one-pound round top loaves. (P.48) By aggressive action of its driver-salesmen, Love's supplied bread racks to retailers and thereafter preempted the best sales space in the racks. (P.49) Love's gave premium prizes, as community club awards, for collections of Love's wrappers.

(XVIII and XIX) The plaintiff then alleged its own profits and own losses over the years 1960, 1961 and 1962, showing that its 1960 profits had turned into losses by 1962. The over-all effects of the wrongful acquisition by Continental of Love's Hawaii caused plaintiff losses, with the resulting loss of credit, whereby the plaintiff was unable to purchase its flour, shortening, wrapping, etc., on the mainland. All of the acts alleged had substantially and materially interfered with the natural flow of interstate commerce, and (XX) because of its injuries from defendants' acts in violation of Section 7 of the Clayton Act, the plaintiff asked for treble damages.

Plaintiff's Count II begins on page 58 of the complaint and by reference, includes fourteen out of the preceding twenty paragraphs of Count I (¶¶ XII, XIII, and XVII-XX are left out), and charges (P.58) the defendants with

violating Sections 1, 2 and 3 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize and restrain commerce in the bread and bread-type roll line of commerce in the City and County of Honolulu geographic market. The alleged conspiracy (P.59-63) was that the defendants did conspire to eliminate and suppress competition between themselves and others to maintain and increase their dominance of 80% of the total bread and bread-type roll line of commerce in the Honolulu market with the intent to exclude competition from the outside and destroy it within, by using methods set forth in the allegations in Count I. Such actions on the part of the defendants have directly and substantially restrained interstate commerce as set forth in Count I, whereby (P.63-69) the plaintiff's business was changed from a profitable one to an almost insolvent one in a period of three years, and plaintiff's credit was destroyed so that it can no longer purchase materials necessary for its bread and bread-type rolls from the mainland but is forced to purchase either locally or in small volume from the mainland. Because of defendants' low bids in Army and Navy bids, (P.69) defendants have made it futile for plaintiff to bid on the same. (P.70-72) The acts of the defendants were prejudicial to the public in that defendants' acts will lead to the elimination of small business in a manner that is prohibited *per se* by Section 2 of the Sherman Act. Wherefore, plaintiff seeks treble damages of the defendants.

Markets Involved

In determining whether defendants' allegedly unlawful acts affected interstate commerce, this court must again rule whether or not any or all of the commerce herein involved is "interstate." In attempting to simplify one of its major problems, plaintiff has again alleged (P.14) that inasmuch as Hawaii became a State on August 21, 1959, under the terms of the Admissions Act,[1] the statutory and artificial status of interstate commerce applied to *all* commerce in the State of Hawaii until August 21, 1961. For the factual and legal reasons fully developed in this court's December 17, 1963 ruling on plaintiff's First Amended Complaint, this allegation is again held to be without merit.

As this court also ruled in that same 1963 decision, while minutely *detailed* allegations of fact are not necessary, the complaint must allege facts showing that the defendants' acts unduly and appreciably restrained or may reasonably be expected to restrain the free flow of interstate commerce. Although plaintiff has here gone to extensive lengths in attempting to allege facts showing that the flow of materials going into the manufacture of bread and bread-type rolls in Honolulu—materials which are concededly in interstate commerce—continues on with unbroken force into the baked bread and bread-type rolls market, thereby making the finished bread products as sold by the plaintiff and defendants in the Honolulu market also in that same stream of interstate commerce, the facts alleged show, however, that this is not so.

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[1]Hawaii State Admissions Act, Public Law 86-3, 86th Congress.

Nowhere does this court find in the allegations of either count that the alleged unlawful acts and transactions of the defendants which form the basis of plaintiff's cause of action, occurred in the course of the admittedly interstate commerce in the market of baking materials and supplies, or restricted in any direct way plaintiff's access to that market. While the allegations show plaintiff's bread products sales fell and its credit thereby failed, there is no factual allegation that the volume of raw materials flowing into the Honolulu market was restrained or affected either *qualitatively* or quantitatively by any alleged acts of the defendants,[2] nor was there any allegation that Continental's acquisition of Love's Hawaii, or Love's own acts were directed at or did restrain plaintiff's access to the financial market (i.e. credit).

The stream of commerce in the baking materials market, on the facts alleged, appears factually and legally to be completely severable from the stream of commerce which may arise after the raw materials have reached the bakery and the processes of transforming the same into bread products on the grocers' shelves and consumers' mouths has taken place in the Honolulu bread and bread-type rolls market area.

The flow of baking material and supplies here must be legally treated as was the flow of gas in *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 471 (1931), when it passed from the high pressure transmission lines (interstate) into the supply mains: "The treatment and division of the large compressed volume of gas is like the breaking

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[2]See *Page v. Work*, 290 F.2d 323, 333 (9th Cir. 1961), *cert. denied* 368 U.S. 875 (1961).

of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."; or as in *Lawson v. Woodmere,* 217 F.2d 148, 150 (4th Cir. 1954), where burial vaults cease to flow in interstate commerce when held for local sale; or, *Central Ice Cream Co. v. Golden Rod Ice Cream Co.,* 184 F.Supp. 312, 319 (N.D. Ill. 1960), where the flavoring extracts, nuts, sugar and cocoa going into the ice cream all came from outside Illinois, nevertheless the commerce in those ingredients ceased when they were made into ice cream.[3]

There is clearly a distinction between the facts here and those in *Pevely Dairy Co. v. U. S.,* 178 F.2d 363 (8th Cir. 1949), where, upon the authority of *Binderup v. Pathe Exchange,* 263 U.S. 291 (1923): "The general rule is that where transportation has acquired an interstate character, 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.' ",[4] the court held the flow of milk shipped in interstate commerce remained in commerce until it reached the ultimate consumer. Here, from the allegations it plainly appears that the movement of all of the raw materials, supplies and equipment going into the manufacture of bread and bread-type rolls ended at the bakery—where the mainland shipper and the Honolulu receiver intended that it should end.

All of the monopolistic and discriminatory acts of the defendants were alleged to have taken place in the bread

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[3]See also cases cited by this court in its prior decision, page 10, on plaintiff's First Amended Complaint.

[4]178 F.2d at 366.

and bread-type rolls market in the City and County of Honolulu geographic area. Plaintiff's broad allegation that defendants' acts affected or restrained the interstate commerce in the bakery's raw materials and supplies market is not factually substantiated by the pleading itself, *Newbury Port Water Co. v. Newbury Port,* 193 U.S. 561, nor do the facts alleged fit into the pattern of *U.S. v. Employing Plasterers Assn.,* 347 U.S. 186 (1954), or *Jewel Tea Co. v. Local Unions,* 274 F.2d 217 (7th Cir. 1960), or *Las Vegas Merchant Plumbers Ass'n. v. U.S.,* 210 F.2d 732 (9th Cir. 1954) *cert. denied* 348 U.S. 817 (1954), or *Northern California Pharmaceutical Ass'n. v. U.S.,* 306 F.2d 379 (9th Cir. 1962), so that this court can apply the law set forth in those cases to the facts here. The pleadings clearly show that the bread and bread type rolls market in Honolulu is a market distinct from the bakery materials and supplies market.

Plaintiff has contended that this court may not summarily determine from the pleadings and without trial by jury the jurisdictional issue as to whether or not any relevant market in commerce is affected by defendants' alleged unlawful acts. It is urged that the language of the Ninth Circuit Court of Appeals: "The theory that the existence of an effect on interstate commerce is a jurisdictional fact, enabling the judge to determine the issue for himself . . . will in practice deprive plaintiffs of their right to a jury trial",[5] forecloses this court from summarily finding that plaintiff has not alleged facts showing that interstate commerce is affected by defendants' acts.

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[5]*Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F.2d 934, 935 note 1 (9th Cir. Feb. 1960).

As indicated by Judge Mathes in *Shaffer v. Coty, Inc.*, 183 F.Supp. 662, 668 (D.C.S.D.Cal. May 1960), since want of Federal jurisdiction renders nugatory proceedings on the merits, to compel the submission of jurisdictional-facts issues for jury determination is contrary to both the spirit and the letter of the Rules. (F.R.Civ.P. 12(b)(1), 12(d), 12(h)(2), 41(b), 43(e), 52(a)). The only exception would be those cases where, as in *Land v. Dollar,* 330 U.S. 731 (1947), the question of jurisdiction is dependent on a decision of the merits. If the *Marks Food* case (*supra* note 5) appeared to go beyond the rule laid down in *Land v. Dollar,* the thrust of the *Marks Food* case has been blunted by *Page v. Work, supra,* wherein two of the three judges who decided the *Marks Food* case together with the Chief Judge of the circuit, held, upon rehearing: "Appellees made a timely motion for a summary judgment of the issue of jurisdiction. If the district court correctly concluded that appellees were entitled to a summary judgment, appellant cannot complain of the deprivation of a jury trial. . . . Appellees were entitled to a summary judgment on the question of federal jurisdiction if no genuine issue existed as to any material fact and if the moving party was entitled to a judgment as a matter of law."[6] Rule 56, F.R.Civ.P.

The basic allegations in support of its contention that the bread and bread-type rolls market in the geographical area of the City and County of Honolulu is a market in a line of commerce are: (1) tourists in Honolulu eat the bread; (2) the Army buys it; (3) the Navy and Coast Guard, airlines and ocean-going ships, commercial fisher-

[6]290 F.2d at 334.

men fishing in international waters, and contractors with projects on Pacific islands, all buy it for consumption outside of Hawaii; (4) Love's used Continental's nationally advertised and copyrighted "Wonder Bread" product name on one of Love's breads sold in the Honolulu market.

The service to tourists in Honolulu while they are disassociated from transportation does not, *ipso facto,* move such bread into the stream of interstate commerce.[7]

The alleged sales to the Army and Navy would appear to be but purely intrastate transactions and would not be transformed into transactions in interstate commerce merely because the bread was incidentally taken by the Army or Navy out of Honolulu (i.e., if it were not bought for the specific purpose of use outside of Honolulu).[8]

Plaintiff's allegations of sales to the Navy and Coast Guard for use outside of the Honolulu market, sales to trans-Pacific airlines and ships for the same purpose, and sales to fishermen, do allege sales in interstate and foreign commerce.

Further, plaintiff alleges that the bringing into the Honolulu market of Continental's copyrighted and highly advertised Wonder Bread of itself manifested an impact of the merger upon interstate commerce. From the facts alleged, it appears that the bread itself was not shipped in to Hawaii by Continental for sale by Love's, but rather that Love's baked Wonder Bread loaves in Hawaii and

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[7]*U.S. v. Yellow Cab,* 332 U.S. 218 (1947). *Hotel Phillips Inc. v. Journeymen Barbers, Etc.,* 195 F.Supp. 664 (W.D.Mo. 1961), *aff'd* per curiam 301 F.2d 443 (8th Cir. 1962).

[8]*Spencer v. Sun Oil Co.,* 94 F.Supp. 408 (D.Conn. 1950).

used thereon the "Wonder" name. The allegations show the Wonder Bread sold in Hawaii was not the same Wonder Bread as sold on the mainland.

Since at this stage of the case no responsive answer has been filed by the defendants, and this court at this time is concerning itself as to whether the facts alleged state a cause of action, without taking into consideration any exhibits or depositions, etc., it would appear that plaintiff's allegations indicating that the ambit of the Honolulu bread products market includes the use of the Wonder Bread label, sales of bread made to overseas airlines and ships for use in interstate and foreign commerce, do thereby plead facts showing that the bread products market in Honolulu is in a line of commerce within the purview of the Federal antitrust acts.

Even so, the area of effective competition as set forth in the complaint, i.e., the relative market, is where the plaintiff and defendants sell bread products. The competition foreclosed by the alleged unfair practices must constitute a substantial share of the relevant market. That is to say, the opportunities for other competitors to enter into or remain in that market must be significantly limited in a substantial share of the line of commerce involved.[9]

The mere fact, however, that a portion of a market area may be in a line of commerce, does not of itself end the problem. The alleged illegal acts of the defendants must affect or restrain an appreciable amount of such interstate commerce. From the pleadings, this court cannot determine whether or not the sale of bread in the Honolulu area market made in interstate commerce con-

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[9]*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1960).

stituted a separate sub-market in which the plaintiff had no participation, or in which no restraint and accompanying damage could be shown,[10] or whether the acts complained of resulted or must probably result in substantially lessening competition in the relevant interstate market, i.e., to such a degree as will injuriously affect the public;[11] nor can we determine whether or not the effect of defendants' acts has brought about a substantial or miniscule restraint of that commerce; nor can we determine the impact of "Wonder Bread" in or on that market.[12] These questions must remain unresolved at this "pleadings" stage.

Count I—Clayton § 7

Defendants have urged that plaintiff's treble damage claim is impermissible under Clayton § 7, 15 U.S.C.A. § 18. Clayton § 7 is strictly an "ounce of prevention" Act, based upon a "may be" monopoly situation.

> "The Committee Reports on § 7 show, as respects the Celler-Kefauver amendments in 1950, that the objective was to prevent accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act test against them.' S.Rep. No. 1775, 81st Cong., 2d Sess., p. 5. And see H.R.Rep.No. 1191, 81st Cong., 1st Sess., p. 3. As the Court stated in *Brown Shoe Co. v. United States,* 370 U.S. 294, 323:

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[10] *Cf. U.S. v. du Pont Co.,* 351 U.S. 377 (1956); *Brown Shoe Co. v. U.S.,* 370 U.S. 294.

[11] *Cf. International Shoe Co. v. Comm.,* 280 U.S. 291, 298 (1930); *Transamerica Corp. v. Board of Governors,* 206 F.2d 163, 170 (3rd Cir. 1953).

[12] *Cf. Atlantic Co. v. Citizens Ice & Cold Storage Co.,* 178 F.2d 453 (5th Cir. 1949); *U.S. v. Frankfort Distilleries,* 324 U.S. 293, 297 (1945).

> 'Congress used the words '*may* be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.' See also *United States v. Philadelphia National Bank,* 374 U.S., at 362, and *United States v. El Paso Natural Gas Co.,* 377 U.S. ——, ——."[13]

As has been said many times, Clayton § 7 supplements the Sherman Act and was intended primarily to *arrest* apprehended relationships *before* those relationships could work their evil. (Emphasis added) *U.S. v. du Pont & Co.,* 353 U.S. 586, 597.

It is a well settled rule of torts that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts of a defendant committed prior to the filing of the action. If damages are attributable to protracted conduct and repetitive acts which continue beyond the date an action is filed, each time the plaintiff's interest is invaded by an act of defendant, he has a new cause of action, and for any particular invasion is thus entitled to recover as damages not only for the injuries he suffers at once but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial.[14] However, a plaintiff cannot recover for anticipated invasions

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[13] *U.S. v. Aluminum Co. of America,* 377 U.S. 271 (1964).

[14] *Lawlor v. Loewe,* 235 U.S. 522 (1914).

even though they were of the same general character of those he has already sustained.[15]

The prohibitory sanctions of Clayton § 7 are triggered to explode by and at the moment of acquisition. That, *after* the moment of acquisition, subsequent business practices do injure competitors in that market does not, because of those subsequent injurious acts, give rise to a claim for treble damages under Clayton § 7.

Since Clayton § 7 is concerned with the future monopolistic and restraining tendencies of corporate acquisition, i.e., probable (and hence not certain) future restraints on commerce, any damages claimed for prospective restraint of trade would be purely speculative,[16] and a plaintiff cannot recover money damages for anticipated but unimplemented acts of restraint which may invade its interests.[17] While Clayton § 7 permits private injunctive and divestiture actions in merger situations which may result in the proscribed restraints or monopolies,[18] nevertheless, no private action for treble damages accrues from a Clayton § 7 acquisition.[19] Count I fails to state a cause of action.

Count II—Sherman Act §§ 1, 2, 3

This case is still in the pleading stage, and the court's ruling at this time concerns itself solely with the suffici-

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[15]*Connecticut Importing Co. v. Frankfort Distilleries,* 101 F.2d 79 (2nd Cir. 1939).

[16]*Flintkote v. Lysfjord,* 246 F.2d 368, 396 (9th Cir. 1957).

[17]*Independent Iron Works Inc. v. U.S. Steel Corp.,* 322 F.2d 656, 673 (9th Cir. 1963).

[18]*American Crystal Sugar Co. v. Cuban-American S. Co.,* 259 F.2d 524 (2nd Cir. 1958).

[19]*Highland Supply Corp. v. Reynolds Metals Co.,* 327 F.2d 725, 728 note 3 (8th Cir. 1964) and cases cited therein.

ency of the pleadings, i.e., the allegations of the complaint, and not upon the facts as they may be proved, or any facts disclosed in any discovery procedure already undertaken by the parties.

Antitrust Violations—(a) Monopoly

Section 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2, 3, "is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or attempt to monopolize any part of interstate . . . commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control . . . Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co. v. U.S.*, 328 U.S. 781, 809, 811, 814."[20]

Plaintiff devoted many pages in stating that for some 10 years before Continental acquired Love's Hawaii, Love's Hawaii had the same 83% monopoly of the bread and bread-type rolls market in Honolulu of which plaintiff now complains and that during such period, because of its monopoly, it possessed the power and ability to set prices of bread products in the Honolulu market, and under Love's Hawaii's "suffocation" policy its prices during such pre-acquisition years were fixed so low that the plaintiff and the other four competing bakeries could

[20] *U.S. v. Griffith*, 334 U.S. 100, 107 (1948).

neither undersell nor price higher than Love's Hawaii and still remain in business.

From the allegations, it appears with certainty that Love's Hawaii had what a layman would call a monopoly of the bread and bread-type rolls market in Honolulu. While contradictory *theories* of recovery may be alleged under the rules, the court may nevertheless take cognizance of contradictory *facts* set forth in the pleading, and this court notes that in 1959 and during the preceding some 15 years, the plaintiff had made good profits and considered that business prospects were bright—even in the face of the alleged "suffocation" practices of Love's. From the pleadings, therefore, it is a logical inference that Love's Hawaii had achieved its monopolistic position by honest industry or by virtue of superior skill, foresight and industry, and the facts alleged do not show violation of § 3 of the Sherman Act.

Mere size, nor continued exercise of lawful powers by even a monopolist, is not illegal when that size and power have been obtained by lawful means and developed by natural growth.[21] "It would be paradoxical for government . . . to encourage a race for the swift and then reward the victor with a sentence of economic death."[22] Under the economic conditions extant in the United States today, bigness is not *per se* illegal—it is here to stay and "the supermarket is not going to be replaced by the small mom-and-pop grocery stores which it superceded."[23]

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[21]*U.S. v. U.S. Steel Corp.*, 251 U.S. 417 (1920). *U.S. v. International Harvester Co.*, 274 U.S. 693 (1927).

[22]Handler: *Some Unresolved Problems of Antitrust*, 62 Columbia L. Rev., 930, 933.

[23]*Supra* note 22, *id.* at 952.

Monopolies coming about through non-predatory, non exclusionary and essentially fair competitive practices are not ipso facto condemned,[24] i.e., through aggressive merchandising, and employing vigorous but nevertheless honest economic maneuvers to enlarge its market position. What is condemned is growth by business methods designed for and having the effect of impeding new entry into the market, or excluding those whose occupancy is already precarious, by recognizably exclusionary devices.[25] Competing fairly and aggressively, regardless of the consequences to ones rivals is not condemned.

The Sherman Act does not make mere size nor continued exercise of its lawful power an offense, when that size and power have been obtained by lawful means and developed by natural growth—absent the *manifest* purpose or intent to exclude competition.[26]

The indicia of continued monopolization are the existence of either the power or the intent to exclude competition or fix prices. The possession of monopoly power is something other than the status in a market of a dominant firm. The dominant firm may have neither the power to exclude competitors, nor the power to fix prices.[27]

Even though Continental was subject to control under the Federal Trade Commission, nevertheless, subject to

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[24]*U.S. v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 341 (D.Mass. 1953), *aff'd* per curiam, 347 U.S. 521 (1954).

[25]*U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (2nd Cir. 1945); and *supra* note 24.

[26]*U.S. v. U.S. Steel Corp.*, supra note 21; *U.S. v. International Harvester*, supra note 21; *U.S. v. Aluminum Co. of America*, supra note 25.

[27]*U.S. v. Columbia Steel Co.*, 334 U.S. 495 (1948).

possible FTC or private contra action, it was free to enter the Honolulu market. However, it was prohibited from using in the Honolulu market the "inanimate market power" it already enjoyed—"market power" meaning the power to control prices or production in the new Honolulu market. "Jurisdiction over prices and power to exclude are prohibited but not decisive of the existence of monopoly power. It would be paradoxical to encourage competitive efforts in a market and then if through unusual and superior skill, foresight and industry in production and marketing, one firm develops undisputed mastery in the market it should [therefore] be sentenced to economic death."[28]

Antitrust Violations—(b) Conspiracy to Monopolize

Plaintiff's broad allegations that the acquisition of Love's Hawaii with its existing monopoly power by the national giant Continental, then under FTC control, was unlawful, is inferentially negated by the fact that the FTC took no action to restrain the merger.

Aside from the fact that each baked bread, no allegation factually indicates that there was any competition between the "merger partners", Continental and Love's Hawaii (Sherman § 1; *cf. U.S. v. First National Bank,* 376 U.S. 665 (1964), nor that Continental ever made any effort to enter the Hawaiian markets before its acquisition of Love's Hawaii. *Cf. U.S. v. El Paso Natural Gas Co.,* 377 U. S. ..... (1964). The merger here was not illegal *per se* under the Sherman Act.

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[28] *U.S. v. Aluminum Co. of America,* supra note 25. Cf. Handler, supra note 22.

Nevertheless, common ownership or control of two "conspiring corporations" does not liberate them from the impact of the antitrust laws.[29] Even though a conspiracy be alleged, there still remains the question of whether the "arrangement" manifests unreasonable restraint of trade or a lawful means of carrying on competition in trade.

A mere agreement between parent and subsidiary corporations to attempt to restrain competition by lawful means is not sufficient to condemn it, unless such agreement sets up a *per se* violation situation.[30]

A monopoly in a "market does not of itself impose restrictions on one who actively but fairly competes for it. . . . [T]here must be some affirmative showing of conduct from which a wrongful intent can be inferred." If the monopolist resorts to any unfair practice with an intent to restrain commerce, or to monopolize, and does not confine itself to skill, foresight and industry in improving or maintaining its market position, such practice is condemned, but if its practices were intended only to resist deterioration of its own position, such practices should not be construed as unfair, within the Sherman Act.[31]

Plaintiff's repeated allegations of the defendants' intent, viz., to keep out mainland competition, to forestall supermarkets from having their own bakeries, and to maintain Love's own position in the market, does not

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[29]*Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951).

[30]*Northern Pac. R. Co. v. U.S.*, 356 U.S. 1 (1958).

[31]*Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960).

itself state an intent evil *per se*. This court can judicially notice that business practice both here and on the mainland under the American competitive scheme, is for a business entity to build up its own profits and, in order to insure such profits, not to take acts which will invite new competitors in the market area or leave its own business vulnerable to raids by firms that can produce the same products at lower costs.

Plaintiff here has repeatedly alleged that the intent of "Love's Hawaii's suffocation plan" (continued on by Love's after acquisition by Continental) was to (1) keep out competition from large mainland baking companies which might wish to invade the Hawaiian market, (2) prevent supermarkets from opening up their own bakeries, and (3) to maintain a monopoly. There is nothing illegal *per se* in the charged intent; such intents are to be found in the minds of every manufacturer in Hawaii with a plant built up and geared to a certain volume of production. Each and every business must aggressively resist encroachment upon the markets for its products or fall behind in the economic race. Again, therefore, the facts pleaded must be analyzed to see if any alleged acts, separately or in combination with others, add up to proscribed and unlawful competitive practices.

Here, all of plaintiff's allegations concerning "the $500,000 machine" purchased and put into operation by Love's Hawaii, Love's retail sales at the bakery, its supplying of racks to supermarkets, and aggressive actions of its bread salesmen in pushing Love's bread in the supermarkets, the new advertising and sales techniques, business and bakery advice supplied by Continental to

Love's, do not separately or in total become unfair business practices condemned under the antitrust acts.

The *Aluminum* and *United Shoe* cases, *supra,* apparently condemned growth by business methods designed for and having the effect of impeding any entry into a market or excluding those whose occupancy is already precarious, by recognizably exclusionary devices.[32] Within the allegations of conspiracy to monopolize (we must also concern ourselves with whether), the plaintiff alleged facts showing that Continental used in the Honolulu market its mainland market power to any substantial extent or whether by operating in the Honolulu market it increased its mainland market power.

Market Power—"Wonder Loaf" and New Breads

Plaintiff alleges Continental's "Wonder" brand name on a round sandwich loaf was used specifically to compete with plaintiff's own similar loaf. Since plaintiff further alleges that this not abnormal competitive gambit was accompanied by such excessive advertising expenses as gives rise to an inference of an agreement between Continental and Love's to use Continental's "market power" to achieve an unfair competitive advantage, a Sherman Act violation is thereby alleged.

It appears possible that there remains an unsettled issue of fact in the allegations contained in pages 37-39 of the complaint concerning the 13 new breads introduced into the market between May 1960 and May 1962. If, as

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[32] *Cf. U.S. v. Besser Mfg. Co.,* 96 F.Supp. 304 (E.D.Mich. 1951), *aff'd* 343 U.S. 444 (1952); *Lorain Journal Co. v. U.S.,* 342 U.S. 143 (1951).

pled, these were introduced and accompanied with excessive advertising costs for the purpose of destroying competition, and it could be shown that the costs of such advertising were as extravagant as alleged, i.e., that the defendants' "market power" was applied, and if there was no factor which could justify such expenditures as fair economic necessities, then from such facts the proscribed intent to destroy competition might be found, i.e., a Sherman Act violation.

Price Fixing

Price fixing is alleged from two aspects, viz., (1) Love's Hawaii and subsequently Love's, conspiring with Continental, maintained its Honolulu bread prices some 3¢ per loaf below comparative mainland prices, and (2) Love's imprinted the retail price on its loaves.

"Price fixing" is an ominous phrase in antitrust suits.

Under the Sherman Act, price fixing means a combination or conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce.[33] "The test is not what the actual effect is on prices, but whether such agreements interfere with the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[34] Any such conspiracy to fix prices is unreasonable *per se*.

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[33] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[34] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). *Cf. Plymouth Dealers Ass'n of No. Cal. v. U.S.*, 279 F.2d 128 (9th Cir. 1960).

Careful and studious consideration of the cases involving "*per se* illegality" in the price fixing field,[35] none of which bears factual resemblance to the instant situation, convinces this court that the principle has no application here. Absent the *per se* illegality doctrine, in determining whether an alleged restraint is unreasonable and therefore illegal and violative of the Sherman Act, resort must be had to the rule of reason. This rule, founded in 1911, in *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1, and *U.S. v. American Tobacco Co.*, 221 U.S. 106, and followed in *U.S. v. E.I. du Pont & Co.*, 351 U.S. 377, 386 (1956), draws the line between zones of legal and illegal conduct under the antitrust laws by consideration of all of the factors and circumstances in any given situation. It permits consideration and analysis of any allegation in relation to the antitrust issues alleged.

The crucial issue, therefore, is whether the alleged conduct and course of action pursued by the defendants resulted in unreasonable restraint of trade within the prohibition of the Sherman Act.[36] In connection therewith it must also be noted that a combination or agreement for price maintenance or which operated directly on prices or price structure . . . "limited in its objectives to intrastate activities, with no intent or purpose to affect [interstate] commerce, is without the reach of the [Sherman] Act, even though there may be an indirect and insubstantial effect on interstate commerce."[37]

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[35]Cf. *Northern Pac. R. Co. v. U.S.*, *supra* note 30, and *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946).

[36]*Adams Dairy Company v. St. Louis Dairy Company*, 260 F.2d 46, 54 (8th Cir. 1958).

[37]*Frankfort Distilleries v. U.S.*, 144 F.2d 824, 833 (10th Cir. 1944).

The term "price fixing" thus entails more than keeping local prices lower than those 2,000 miles away, or the printing of a price on a loaf of bread. The "price fixers" must have both a leverage and an intent, to the detriment of interstate commerce in the relevant market. The leverage must be such that the buyers in the market are unable to look other than to the fixer for the product sold, and the resultant price fixed was at an arbitrary and noncompetitive basis.[38] A quick review of the cases indicated that the "price fixing" alleged here has no resemblance to that condemned in the *Socony-Vacuum* (supra note 33) or *Parke-Davis* cases. There is no allegation that the defendants had any leverage other than the public's demand for their bread. There is likewise no allegation that the price was unreasonable or arbitrary.

This court is not yet ready to say that it is an "outlawed competitive practice" for a local subsidiary of a national corporation to agree with its noncompetitive parent as to what local price should be put on the subsidiary's products in the local market, in the manner here alleged—so long as that price is one at which the subsidiary may make a profit, and absent such factual allegations as were found in *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964). Here the only factual allegation is that the prices in the Honolulu market were lower than those on the west coast of the mainland United States. This broad allegation, when coupled with the facts above indicated, is not sufficient to support the claim of "price fixing" within the purview of the Sherman antitrust statutes.

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[38]See *U. S. v. Parke-Davis & Co.*, 362 U.S. 29 (1959).

The only other "price fixing" alleged was that Love's printed the price of its bread in large figures on the end of each loaf, and that therefore the retail dealers could not raise the price and the competitors were held to meet the same price. There were no facts alleged indicating that such price, unilaterally fixed by Love's and its parent corporation, basically did anything else but protect the public and keep down the price of bread in the Honolulu market. The word "conspiracy" carries an evil sound, but the facts supporting the "conspiracy" alleged here failed to show that either the objectives or results were evil *per se*. The plaintiff does not allege that the price as fixed in any way prevented the retailers from handling Love's bread at a profit.

Also, it does not appear that the imprinting of the price on the defendants' loaves of bread deprived the retailers of their right to exercise their own free judgment as to whether to sell defendants' products at all or to sell defendants' products at any price they chose, nor do the facts alleged indicate that the competitors were, by anything other than the normal market competitive "coercions", deprived of their right to set their own prices on their own products. There is no allegation that the imprinted price was below the retailers' costs, or that the wholesale sale price was below plaintiffs' or defendants' costs, or that plaintiff or defendants could not make a profit at defendants' wholesale price to the retail outlets, or that the retailers could not make a profit at the imprinted price. Likewise, there is no allegation that the retailers were estopped by any coercive acts of defendants from selling defendants' bread at a higher price.

Nowhere do the facts allege any coercion on the retail outlets or competitors to achieve resale price maintenance.

It thus clearly appears that the facts of the "conspiracy to fix prices" by affixing the price to the loaves, as alleged in the complaint, do not manifest a price-fixing "conspiracy." No injury to the public, no injury to the retailer, and no direct and unlawful injury to the competitor who was forced to meet that price were alleged. Plaintiff's only complaint by inference was that the price so fixed did not give the plaintiff the margin of profit the plaintiff might have desired. The sum total of plaintiff's allegations regarding "price fixing" fall short of showing there was any actual restraint of trade in the bread products market—other than the normal restraint arising from the public's demand for a product and the correlative market demand upon competition that the "fixed price" be met. Such price fixing as here alleged is not condemned by the Sherman Act.

As a correlative to "price fixing", the facts alleged relative to Love's "bid sales" to the Army and Navy, do not show that Love's lost money on such sales or that its success (predating and subsequent to March 1960) in securing the bids involved any unfair competitive actions proscribed under the Sherman Act.

Conspiracy

To establish a violation of either §§ 1 or 2 of the Sherman Act, plaintiff is required to allege facts showing that the unlawful conspiracy had an impact on interstate commerce or because the acts complained of occurred in

interstate commerce, or because those acts, though occurring wholly on the local level, substantially affected interstate commerce.[39] "The test of jurisdiction is not that the acts complained of affect the business engaged in interstate commerce but that the conduct complained of affects the interstate commerce of such business."[40]

While the Sherman Act condemns wholly local business restraints affecting interstate commerce, as well as restraints in interstate commerce, the effect of the local restraints on interstate commerce "must be direct and substantial, and not merely inconsequential, remote or fortuitous."[41]

If defendants' acts did substantially burden or prevent competition in the sale of bread products to the airlines and shipping companies, then there might be sufficient effect upon interstate commerce to justify the plaintiff's complaint.[42]

An area in plaintiff's factual allegations which keeps the plaintiff in this court is the allegation that defendants introduced so many new breads, at such tremendous advertising costs, in such a short period of time, and if the plaintiff can prove that the practices and the costs accompanying them were, as alleged, for the purpose of preventing and eliminating competition, and that such acts substantially affected the interstate commerce aspects

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[39] *Las Vegas Merchant Plumbers Ass'n. v. U.S.*, 210 F.2d 732 (9th Cir. 1954), *cert. denied* 348 U.S. 817 (1954).

[40] *Page v. Work*, 290 F.2d 323, 332 (9th Cir. 1961), *cert. denied* 368 U.S. 875 (1961).

[41] *Supra* note 40.

[42] *Cf. U.S. v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947).

of the bread products market in the Honolulu area, then it has stated a cause of action.

The facts as alleged by plaintiff here do not show any effort on the part of the defendants to deprive the plaintiff of the necessary supplies for the operation of its business, nor does there appear to be any interference with plaintiff's sales of products either to the retailers or to the Army, Navy, airlines, etc., or direct interference with plaintiff's business in any fashion, or restraint upon the competitive sale of bread products in the market—other than by excessive and excessively expensive advertising and aggressive new bread sales policies.

The question to be answered by this court may thus ultimately be whether or not defendants' practices in the market amounted to an unreasonable restraint of trade within the purview of the Sherman Act.[43] If, as alleged, defendants' excessive advertising, coupled with its new breads, are proved to have been engaged in, solely for the purpose of restraining or foreclosing competition in the bread products market in the Honolulu area, and if those practices are made possible by the leverage given by defendants' monopoly position and/or the "deep pocket" or market position of Continental, then it would appear that there exists an issue of fact which cannot be disposed of on the pleadings hereon.

At this stage, we must again note that this case is still in the pleading stage. While the practices alleged at great length (excessive and expensive advertising with the introduction of new breads, etc.) might be susceptible

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[43]See *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964).

of two interpretations: 1, superior skill and operational ability, coupled with strong, aggressive action, brought about by constant fear of mainland firms or supermarkets entering the Honolulu market, and solely aimed at maintaining its already acquired position in defendants' share of the market; or 2, basically predatory and aimed at restraining and destroying competition, both potential and local. Since the pleadings allege the 2nd, for the purpose of this motion to dismiss, we must accept the 2nd as the correct interpretation.

This court is not at this point concerned with whether or not plaintiff can prove that these overt acts were carried out with the evil intent alleged. Since this issue of fact remains, this court at this time will not summarily dismiss the Count II on pleadings alone.

Defendants' motion to dismiss Count I is granted.

Defendants' motion to dismiss Count II is denied.

Defendants are given twenty (20) days from the date hereof to answer, or otherwise plead.

Dated: Honolulu, Hawaii, this 21st day of September, 1964.

Martin Pence

United States District Judge

Appendix C

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4. Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district Court of the United States in the district in which the defendant re-

sides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7. Clayton Act

October 15, 1914, Chap. 323, Sec. 7, 38 Stat. 731, December 29, 1950, Chap. 1184, Sec. 1, 64 Stat. 1125, 15 U.S. Code, Sec. 18.

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

CONSTITUTION OF THE UNITED STATES
AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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28 U.S.C., Section 2072, Fed. Rule Civ. Proc. 50(b):

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the dis-

trict courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Federal Rule of Civil Procedure, 50(b) provides:

Rule 50.—MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

* * * * * * * * * * * * *

(b) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Appendix D

			$484,137.03	*$476,687.41*	*$477,458.60*	*$413,476.27*	*$286,432.37*	*$318,217.51*	
	1956	**1957**	**1958**	**1959**	**1960**	**1961**	**1962**	**1963**	**1964**
Income									
Sales	$469,159.44	$444,800.04	$428,062.34	$419,870.31	$420,838.19	$364,533.14	$254,302.28	$284,437.75	$124,566.18
Less costs	349,148.33	339,662.24	334,556.94	326,258.31	347,230.10	328,627.05	259,888.63	283,773.98	112,821.71
Gross earnings	$120,011.11	$105,137.80	$ 93,505.40	$ 93,612.00	$ 73,608.09	$ 35,906.09	$ (5,586.35)	$ 663.77	$ 11,744.47
Interest	2,077.29	2,759.79	3,453.32	3,900.00	4,200.00	204.59	—	—	268.36
Rental	—	—	—	442.34	65.70	—	799.22	2,104.63	532.80
Sale of assets	—	—	—	—	—	—	—	—	(40,587.26)
Miscellaneous	457.98	310.88	439.17	308.95	461.49	244.52	171.85	199.96	99.98
	$122,546.38	$108,208.47	$ 97,397.89	$ 98,263.29	$ 78,335.28	$ 36,355.20	$ (4,615.28)	$ 2,968.36	$(27,941.65)
Expenses									
Salaries	$ 45,944.17	$ 45,680.00	$ 44,376.77	$ 41,596.50	$ 37,298.75	$ 28,592.50	$ 20,350.00	$ 14,785.40	$ 5,975.00
Taxes	10,879.78	8,000.95	7,090.87	6,872.70	7,008.26	4,184.59	3,385.76	4,970.76	2,363.84
Utilities	520.07	781.30	930.21	942.40	1,023.53	1,123.16	1,029.05	1,042.23	377.84
Automobile	2,260.12	2,142.00	1,215.00	1,000.72	1,023.67	900.00	3,567.34	10,055.75	3,956.28
Advertising	1,778.15	5,021.67	10,862.31	4,790.37	6,408.55	212.67	23,796.77	272.50	50.88
Fees	424.50	412.50	428.10	1,513.09	2,198.65	2,216.49	2,491.58	2,120.81	2,154.30
Insurance	1,508.41	1,589.65	1,621.30	1,243.48	1,322.88	1,545.33	1,644.24	577.55	74.14
Repairs	32.80	115.93	60.67	438.43	17.48	8.26	57.52	22.14	—
Office supplies	133.95	172.30	831.77	415.42	531.86	900.51	1,459.32	442.05	291.55
Contributions	140.00	140.00	35.00	105.00	180.00	55.00	26.00	20.00	—
Entertainment	581.85	284.95	263.15	195.39	144.24	732.20	979.34	213.74	69.20
Miscellaneous	3,159.59	2,350.88	1,020.54	2,962.27	1,440.91	727.05	5,327.71	1,844.35	1,326.15
Interest	—	—	150.44	187.26	169.01	4,177.41	10,260.20	11,483.60	6,038.41
Travel	—	—	—	—	2,696.63	982.99	45.00	100.00	—
Commissions—mileage	—	1,310.21	3,669.92	3,723.81	4,051.92	3,487.63	1,500.86	4,787.18	15,495.40
Off-street parking	234.74	234.74	234.74	234.74	234.74	1,298.83	—	—	—
Depreciation	260.37	187.57	145.12	144.76	3,035.16	59.13	111.90	400.46	227.00
Rent	—	—	—	—	—	—	—	—	—
	$ 67,858.50	$ 68,424.65	$ 72,935.91	$ 66,366.34	$ 68,786.24	$ 51,203.75	$ 76,032.59	$ 53,138.52	$ 38,399.99
Earnings before income tax	$ 54,687.88	$ 39,783.82	$ 24,461.98	$ 31,896.95	$ 9,549.04	$(14,848.55)	$(80,647.87)	$(50,170.16)	$(66,341.64)
Less income tax	26,607.36	17,398.10	8,865.53	12,917.77	3,349.68	—	4,482.27	14,266.74	—
Net earnings	$ 28,080.52	$ 22,385.72	$ 15,596.45	$ 18,979.18	$ 6,199.36	$(14,848.55)	$(76,165.60)	$(35,903.42)	$(66,341.64)
Less dividends paid	14,392.00	16,191.00	16,191.00	17,990.00	6,296.50	2,698.50	—	—	—
	$ 13,688.52	$ 6,194.72	$ (594.55)	$ 989.18	$ (97.14)	$(17,547.05)	$(76,165.60)	$(35,903.42)	$(66,341.64)
Retained earnings, Jan. 1	93,286.84	106,975.36	113,170.08	112,575.53	113,564.71	113,467.57	95,920.52	19,754.92	(16,148.50)
Retained earnings, Dec. 31	$106,975.36	$113,170.08	$112,575.53	$113,564.71	$113,467.57	$ 95,920.52	$ 19,754.92	$(16,148.50)	$(82,490.14)

Appendix E

G. *Rulings of the Court*

The major rulings of the trial Court are as follows:

A. On a motion to dismiss, the Court prevented a jury trial on the issues of whether defendants violated the antimerger provision of the Clayton Act, Section 7; whether the manufacture of bread and bread-type rolls in Honolulu was in interstate commerce; whether the merger between Continental Baking Company and Love's, Hawaii was illegal under the Sherman Act; whether Love's dominant position was acquired by predatory means.

B. At pretrial, the Court refused to allow plaintiff to amend its complaint that defendants sold bread to the military at below cost, where in violation of Section 2(a) of the Robinson-Patman Act in their sales of Wonder Bread to retailers in Honolulu as contrasted to other Pacific Coast cities, and arbitrarily curtailed plaintiff's time for discovery (Cr. 386).

C. At the trial, the Court completely immunized the merger not only in ruling that it was not a separate offense under the Sherman and Clayton Acts, but also in negating any effect the merger had as probative evidence that defendants agreed to conspire to monopolize interstate trade and commerce in the City and County of Honolulu.

D. At the trial, the Court commented adversely on all of the major items of evidence introduced by plaintiff in its instructions and in effect, by singling out the evidence and commenting adversely on it, crippled plaintiff's case.

Further, the Court told the jury it should consider Holsum and Oroweat's entry into the market in determining whether or not Love's possessed monopoly power.

E. The trial Court ruled against the admissibility of key documents such as Exhibits 621 and 623 which were direct evidence of Love's intent to exclude Bailey's, and the Court also refused to allow the use of these genuine documents for impeachment purposes.

F. The trial Court ruled against the admissibility of a relevant and material final judgment in a Federal Trade Commission complaint against Continental Baking Company.

G. The trial Court used a form of verdict which had the effect of separating defendants' violations of the antitrust laws from injury to the plaintiff as a constituent part of defendants' violation of the Sherman Act.

H. The instructions of the Court required:

(1) Plaintiff to prove that defendants had agreed with a specific intent to exclude or destroy competition as the indispensible element of a conspiracy to monopolize, and without any instruction that wholly innocent acts may be relied upon as proof of a conspiracy to monopolize on purpose to thwart competition.

(2) Plaintiff to prove monopoly power without benefit of the legal inference that 80% of the market constitutes monopoly power, and with the instruction that 100% of the market is not to be considered by the jury as monopoly power.

(3) Plaintiff to prove monopolization by showing that monopoly power was maintained by unlawful or excessive and abnormal acts, and further that such acts were done

with a purpose to exclude without the benefit of the instruction that the doing of excessive and abnormal acts was monopolization, and being further required to overcome the instruction that such acts were justified if done by Love's to promote its business or expand the total bread market.

(4) Plaintiff to prove monopolization without the burden of proof shifting to the defendant upon the finding Love's possessed 80% of the relevant market.

(5) Plaintiff to prove a convincing case without the jury determining the existence of a purpose to monopolize from all the practices of the defendant and without being able to place its judgment over the judgment of the officers of Love's.

(6) Plaintiff could not argue a Section 1 violation to the jury.

I. The Court ruled that plaintiff could not obtain damages for the year 1960 because the Court lacked subject jurisdiction.

J. The Court struck out evidence that defendants had employed discriminatory discounts on rolls and buns to restaurants and drive-ins in Honolulu because plaintiff was not selling to this category of trade.

K. The Court ruled out as evidence the difference in prices as to Wonder Bread in Honolulu as contrasted to other West Coast cities.

L. The Court made the following orders on plaintiff's offer of proof:

(1) The Court struck out all evidence concerning discounts to restaurants and drive-ins as to buns and rolls.

Plaintiff's Exhibit No. 880 for Identification is a series of checks from Love's, Delaware to restaurants and drive-ins showing discount payments back to said businesses. Some of these checks ran as high as $200.00 per month. These payments started with a special quantity discount schedule for Scotty's Drive-In (Pl. Ex. 3681, Tr. 626-627). It was not part of Love's regular price schedule (Tr. 1929).

The classification of 5,000 or over dozen was usable by Scotty's and perhaps others (Tr. 627-628). Love's had Scotty's business (Tr. 629, 632). These discount payments and evidence were ordered stricken on the ground that plaintiff, as a matter of law, did not seek the restaurant trade (Tr. 3577-3578).

(2) The Court refused plaintiff's offer as to the existence of below cost or unreasonably low prices offered by Love's to the military.

The plaintiff's officers, Mr. Akahoshi, prepared tables showing that Love's would have lost large amounts had it sold its bread at the prices it sold to the military (Pl. Ex. 3833 for Id.; Cr. 376, et seq.)

He further showed the cost per pound of the manufacture of bread by Love's, as shown on Love's cost form, No. 528. These costs were above the prices bid by Love's to the military (Cr. 384-385; compare with "bid price" Cr. 376, et seq.)

The Court held that these computations were not sufficient to establish below cost sales (Tr. 3163-3176).

(3) The Court ruled that evidence that Wonder Bread was sold at lower prices in Honolulu than in mainland West Coast cities was inadmissible (Tr. 2878-2880).

The prices of Love's bread products for Honolulu are contained in Pl. Ex. 3693 (in evidence, January 13, 1966; Cr. 339). Bailey's offered to prove, from Answers to Interrogotaries, that these prices were lower than those charged in Seattle, Portland, San Francisco, Los Angeles and San Diego (Tr. 2878-2879).

Plaintiff urged that Continental was required to offer Wonder Bread at the same price as prevalent on the West Coast (Tr. 2879). The Court rejected the offer as irrelevant (Tr. 2878-2879).

(4) The Court ruled that evidence of Continental's acquisition program on the mainland was irrelevant (Tr. 2717-2718).

(5) The Court ruled that Bailey's could not show that Love's, Hawaii had engaged in predatory practices against its competitor Levy's.

The President of Levy's, Mr. George Smith, was told by Love's driver-supervisor that Love's had its drivers take Levy's bread off retail store racks, keep the bread in the Love trucks for a few days, and return the bread stale to the retail store shelves (Tr. 2418-2419). The Court rejected the offer on the ground it was hearsay and highly prejudicial (Tr. 2419).

(6) As heretofore indicated the trial Court ruled that plaintiff could not prove that Love's, Hawaii had called a meeting of bakers and told them that outer island bread prices should be raised (Tr. 2414).

H. *Major Questions Presented*

By reason of the trial Court's rulings on a motion to dismiss, the Court's instructions to the jury and rulings

on the admissibility of evidence, it is respectfully submitted that the following are the major questions presented in this appeal:

1. Does Section 4 of the Clayton Act allow an action by a private litigant against defendants for their violation of the antimerger provisions of Section 7 of the Clayton Act?

2. Is a litigant under Section 4 of the Clayton Act entitled to a jury trial on the issues of whether or not a merger between an already dominant firm and an even more powerful acquiring firm is in violation of Sections 1 and 2 of the Clayton Act?

3. May a trial Court in an action involving a merger alleged to be unlawful under the Sherman Act completely immunize the merger by not only preventing the plaintiff from raising a cause of action under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, but also by instructing the jury that standing alone the merger was not unlawful and that the plaintiff presented no direct evidence of an oral or a written agreement to monopolize the Honolulu market despite the introduction into evidence of the merger agreement?

4. May a trial Court in a Section 2 conspiracy to monopolize case fail to plainly define the offense as set forth in *American Tobacco Co. v. United States,* 328 U.S. 781?

5. May a trial Court refuse to instruct the jury in a Section 2 Sherman Act case that the existence of monopoly may ordinarily be inferred from a predominate share of the market held by the defendants?

6. May a trial Court in a Section 2 Sherman Act case refuse to instruct the jury that the burden of proof shifts to the defendant upon the showing that a company possesses monopoly power generally over 64% of the relevant market, to justify the dominant position by proving it was acquired by accident, acumen or circumstances beyond its control?

7. May a trial Court in a Section 2 Sherman Act case instruct the jury that one holding monopoly power is in violation of Section 2 of the Sherman Act only if it exercises its power unlawfully or engages in abnormal or excessive acts with an unlawful purpose.

8. Is not a trial Court in a Section 2 Sherman Act case required to instruct the jury that one holding monopoly power monopolizes in violation of Section 2 of the Sherman Act when it exercises its power with a purpose to thwart competitors even though its acts are not unlawful in themselves?

9. May a trial Court instruct the jury in a Sherman Act case that the jury must be convinced by the plaintiff's evidence, and require plaintiff to exclude inferences that defendants' acts were done for a normal or lawful purpose.

10. (a) Is the recommendation of a defendant's advertising agency and a contact report stating that the recommendation was discussed in detail among the executive officers of the defendant and the executive officers of the advertising agency and approved, admissible as a statement of an agent made within the scope of his duties, or as a business record, or as a declaration of a co-conspirator?

(b) And even assuming said advertising and contact reports are not admissible, may they not be used to impeach the declarations of their author who, on the witness stand, denied the truth of these reports?

11. Is a final judgment in a Federal Trade Commission proceeding against a defendant determining relevant matters admissible in evidence under Section 5 of the Clayton Act?

12. May a trial Court rule as a matter of law on the face of a complaint alleging that the manufacture and distribution of bread and bread-type rolls in the City and County of Honolulu is in interstate commerce and that defendants have employed an interstate conspiracy to exclude the complainant from the industry without affording a jury trial on the issues as to interstate commerce raised by the complaint?

13. Does the Hawaii State Admissions Act, Public Law 86-3, 86th Congress, apply the Sherman Act to Hawaiian commerce during the period August 21, 1959, to August 21, 1961?

14. May a trial Court refuse to submit a conspiracy action under Section 1 of the Sherman Act to the jury after finding that the evidence justified submitting a Section 2 conspiracy case? But after also ruling that plaintiff had not proved monopoly power?

15. Did plaintiff's evidence warrant submission to the jury that defendants:

(1) were selling at unreasonably low prices to the military;

(2) were selling Wonder Bread at a lower price in Honolulu than in other major cities on the West Coast; and

(3) were giving discriminatory discounts on bread and rolls to restaurants.

16. Did not the trial Court erroneously exceed the proper boundaries of judicial conduct in failing to present the plaintiff's theory of the case to the jury, in giving instructions which as a whole favored defendants' case and minimized plaintiff's case, in unduly and erroneously commenting on plaintiff's evidence in its instructions, in erroneously singling out plaintiff's failure to call its ex-manager as a witness, and in unduly limiting plaintiff's cross-examination?

Appendix F

The instructions proposed with regard to the Federal Trade Commission proceedings against Continental Baking Co. were Instructions Nos. C and D. Instruction No. C was as follows:

"I have allowed the plaintiff to introduce into evidence the Complaint of the Federal Trade Commission against Continental Baking Co. in Docket No. 7880 and the Final Order therein obtained.

"You are instructed that such order or decree has been allowed into evidence for limited purposes and is only prima facie proof of the matters involved which I shall hereafter outline to you. Defendant may rebut any of said matters.

"The final order is relevant and material to the cause here on the following matters only:

1) Continental Baking Co. was charged and did obtain many companies who manufactured and sold bread and bread-type rolls in the United States. These companies are:

Omar Co. Inc.
Southern California Bakery Co., San Diego, Calif.
Smith Baking Co., Lincoln, Nebraska
Royal Baking Co., Raleigh, North Carolina
Morton Packing Co., Crozet, Virginia and Webster City, Iowa
DiCarlo's National Bakery, Inc., San Pedro, Calif.
Rochester Bread Co., Rochester, Minnesota
Braun Baking Co., Pittsburgh, Pennsylvania

"It acquired the frozen food manufacture (sic) Morton Packing Co. in 1955, and a product of the company, Plantation Bread competed directly with plaintiff. The acquisition of these companies by Con-

tinental Baking Co. increased its market position and was detrimental to actual and potential competition throughout the United States.

"Not all of these acquisitions in and of themselves restrained trade or monopolized in the localities involved but all of them taken together allowed Continental Baking Co. a market position which enhanced its competitive position to the detriment of actual and potential competitors throughout the United States.

"Now this does not mean that Continental Baking Co. violated the antitrust laws to the injury of the plaintiff here, and you are not to use the Federal Trade Commission order to determine all issues in this case. This final order may be used to determine the purpose of Continental's acquisition of Love's Hawaii in 1960, whether it was simply an investment or was motivated by a purpose to increase Continental's market position; it may be used to establish the extent of Continental's market position in the Baking industry and its ability to apply the leverage of its various breads to exclude and/or suppress competition in the Honolulu market."

Instruction No. D:

"You are instructed that acquisitions of other baking companies by Continental Baking Co. prior to 1960 has tended to concentrate the manufacture, distribution and sale or bread and bread-type rolls in the United States and have the following effects on competition:

"a) It has substantially lessened actual and potential competition throughout the country in the manufacture, distribution and sale of bread and bread-type rolls;

"b) It has enhanced its competitive position in the manufacture, distribution and sale of bread and bread-type rolls to the detriment of actual and potential competition throughout the country;

"c) It has significantly increased the trend to industry wide concentration of the manufacture, distribution and sale of bread and bread-type rolls.

"In determining whether or not defendant Continental Baking Co. has violated the antitrust laws as I instructed you, you may take these facts as being prima facie proved."

"*Emich Motors v. General Motors,* 340 U.S. 558;

"*20th Century-Fox v. Samuel Goldwyn* (9th Cir. 1964) 328 F.2d 190."

SUPREME COURT, U. S.

FEB 4 1969

JOHN F. DAVIS, CLERK

No. 903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

BAILEY'S BAKERY, LTD., *Petitioner,*

v.

CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit of which review is sought appears at 401 F.2d 182. It also appears as Appendix A to the Petition.

STATUTES INVOLVED

The statutes involved are §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 7 of the Clayton Act, 15 U.S.C. § 18; § 4 of the Clayton Act, 15 U.S.C. § 15; Federal Rules of Civil Procedure, Rule 50(b); and the Seventh Amendment to the Constitution of the United States. These statutes appear as Appendix C to the Petition.

QUESTION PRESENTED

Whether, on the factual record of this case, the Court of Appeals properly determined, in affirming a judgment entered in accordance with a jury verdict finding no violation of the antitrust laws by respondents, that there was insufficient evidence of any illegal activity proximately causing any loss that petitioner had sustained.

Petitioner also seeks to present the question whether the Seventh Amendment to the Constitution would prevent a court of appeals from affirming a judgment on whatever valid legal ground is presented to, but not passed upon, by the district court, including failure of the district court to grant a judgment n.o.v. to a movant for a directed verdict who obtains a judgment on a jury verdict.

STATEMENT

A. Proceedings Below

This is a private action for treble damages arising under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Continental Baking Company and its wholly-owned subsidiary Love's Biscuit & Bread Co., Ltd. It was tried before a jury in the United States Dis-

trict Court for the District of Hawaii. On a special verdict, the jury found that there had been no violation of the antitrust laws. Judgment was entered for respondents on the verdict. On appeal, the judgment was affirmed per curiam by the Court of Appeals for the Ninth Circuit. Noting that "the case was tried before a jury, which returned verdicts in favor of [respondents]," the Court of Appeals concluded that "there was insufficient evidence that any loss which [petitioner] sustained proximately resulted from illegal activity on the part of the [respondents] to justify submission of this issue to the jury."

B. The Parties

Continental is a mainland baking company with plants located in various markets in the United States. Continental never competed, and there is no evidence it ever intended to compete, in Hawaii. In 1960 Continental formed a subsidiary, Love's Biscuit & Bread Co. of Delaware ("Love's Delaware"), which in May 1960 acquired the assets of Love's Biscuit & Bread Co., Ltd. of Hawaii ("Love's Hawaii"). None of the management personnel and none of the policies of Love's Hawaii were changed.

Love's had been in the baking business in Hawaii since 1848. After the outbreak of World War II, it was equipped, under special wartime priorities, to supply large quantities of bread to the military in the Pacific area. Since 1948, when Mr. O. T. Edwards, with a lifetime of experience in the mainland baking industry, came to Honolulu to manage the company, Love's has been retooled twice, resulting in substantial

cost reductions, and has introduced automatic baking equipment and other cost-saving advances in bread production into Hawaii. R. 1019-24, 1098, 1614-16, 1638-44.

Alone among Hawaiian bakers, Love's joined one of the several national baking cooperatives, Quality Bakers of America ("QBA"). These organizations give their members all of the expert promotion, production, management, and accounting services enjoyed by baking plants in a system where the individual plants are owned by one corporation such as Continental. Both the cooperatives and corporate owners have available various trade names for use by the local plants. Continental's principal brand is "Wonder"; QBA's principal brand is "Sunbeam." R. 1605-08, 1655-56.

Love's was for years among the most profitable of the 120 bakers in the QBA system. R. 2344. It consistently had substantial sales and profits during the QBA period and through the two and one-half years covered by this lawsuit. Exs. 3796-98, 572-74. Love's earned a profit during every single quarter of the complaint period. Exs. 832-33. Prior to 1961 Love's regularly produced about 80 percent of the bread sold at wholesale in Honolulu. R. 969-71, 1033-34, 1201-02, 4068-69.

Love's throughout all the years since Mr. Edwards took over has invested a substantial part of its earnings in advertising and other promotion.

Since per capita rice consumption in Hawaii was about twenty times the mainland rate, while bread was consumed at only half the mainland rate (R. 1611-13;

Exs. 5013, 5061-62, 5065), the real prospect for Love's growth, apart from Hawaii's population and tourism increases, lay in the conversion of rice consumers to bread consumers. Love's long-term promotional efforts were directed to this objective, and this was the reason for Love's steady investment in advertising extolling the nutritional advantages of bread over rice, a theme that ran back as far as the early 1950's. R. 1629, 1632-36, 3634-35. Throughout these years Mr. Edwards was urging petitioner and other bakers to advertise the benefits of bread and was even offering to bear most of the cost of such advertising to be published in the name of the entire bread industry. With one exception, all of Mr. Edwards' efforts were rejected. R. 1626, 1678-87, 1795. The attitude of petitioner's management was summed up in the statement to Mr. Edwards, "You spend money. I make money." R. 1690.

Love's other promotional efforts—routine on the mainland, but novel in Honolulu—were also aimed at converting the Hawaiian rice market to bread. Under Mr. Edwards, Love's over the years introduced and promoted variety breads, distributed bread racks to the stores so that the bread (of all bakers) would be adequately displayed, distributed QBA books to stores on how to build profitable bakery departments, distributed free samples and put demonstrators in stores, and engaged in various merchandising efforts directed especially to the young whose dietary habits were not yet formed. R. 1103-05, 1117-18, 1636-37, 1665-73, 2952-55; Exs. 1002, 1003A, 5017, 5112-19. All of this was intended to, and did, build up the total market for bread in Hawaii.

Petitioner, on the other hand, failed even to do routine merchandising. It did virtually no advertising (R. 3073, 3104-06); it had no sales promotion or marketing staff (R. 3889, 3902-03); it never joined a bakers' cooperative such as QBA (R. 1607, 4035); it never attempted to market franchised brands, which are common in the industry (R. 4035-36); it never distributed any point of sale material (R. 4007, 4020); it never distributed variety breads (R. 3109-10, 3996-97); it owned no delivery equipment, one consequence of which was that it could not compete for military business (R. 2097-98, 3020-21, 3075); it produced under the inferior straight dough method, as compared to the sponge dough method used by the entire mainland baking industry and by Love's. R. 1019-20. When petitioner's drivers, who were viewed as solely responsible for petitioner's sales efforts and who followed their own unorganized and overlapping routes (R. 1266-67, 1832, 3075, 4016-22, 4129-31, 4161-62), requested some sales assistance from petitioner (R. 3905, 3984-85, 3992-93), the request was rejected because, according to petitioner's president, "There is nothing very difficult about selling bread." R. 4019.

Petitioner never competed for whole segments of the available business. Not only did it leave the variety bread business and the bun and roll business to others, but its distribution was largely limited to downtown Honolulu, and it made no effort to sell to various commercial buyers. It never competed for any of the military contract business both because it lacked the necessary production and delivery equipment and because it did not want to subject itself to federal wage

and hour legislation. R. 1688-99, 2097-98, 3892-93, 3899-3900.[1]

Beginning in 1957 petitioner experienced a steady decline in sales. From 1956 to 1959, in an expanding market, petitioner's net sales declined from $469,000 to $419,000. Ex. 507B. In 1960, the year of Love's acquisition by Continental, Bailey's sales leveled off at $420,000. *Ibid.* In 1961 they once again resumed their pre-1960 declining trend. *Ibid.*

The company's principal owners testified that the declining trend in petitioner's sales throughout 1957, 1958, and 1959 was of no particular concern to them. The

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[1] Petitioner incorrectly states (p. 24) that the trial court "did not allow the petitioner to show that Love's bid prices to the Army and Navy were below its cost." The proof showed that Love's bid prices to the military were, at times, five cents below its civilian wholesale price. Respondents showed, among other things, that military sales had considerably fewer costs attributable to them and that during much of the period in question petitioner sold to a small-volume civilian account at substantially the same price it was claiming it could not quote on the high-volume, low-cost military business. Exs. 5155-67. The trial court expressly was of the view that the issue of Love's prices to the military was before the jury. R. 3876.

The only complaint petitioner can possibly have is the exclusion of Ex. 3833. This exhibit was offered to prove that either Love's military sales were below cost or, alternatively, that those prices were "unreasonably low." R. 3176-77. The exhibit assumed identical costs of selling bread to civilians and to the military and then pursued various arithmetical steps to establish the amounts Love's would have lost if all its sales were at the lower military price. When the offer was made the record was replete with evidence that major cost factors, such as advertising, stale returns, special display promotions, packaging, and salesmen's commissions, were incurred in the civilian side of the business, but not in the military. *E.g.*, R. 35-38, 411-14, 428-29. The offer of proof took into account none of these cost differences, and was properly rejected on that ground. R. 3178.

reason given was that profits held up in spite of the sales decline. R. 4120-21, 4159.[1] As expressed by one of petitioner's officers and principal witnesses, petitioner "never did concentrate too much on sales at any time .... We got the sales [without working to get them] so we were satisfied." R. 4131. Consequently, as petitioner's officers were forced to admit, the company did literally nothing to halt its sales decline either before or after Continental's acquisition of Love's. R. 3894-98, 3079, 3099. Instead of responding to its sales losses with adequate investments in advertising, capital equipment, and sale support for its drivers, petitioner's management effectively stripped the company of its own financial resources. Over the five-year period 1957-1961 the company made, according to its own records, $48,311 while its owners took out dividends of $59,366. Ex. 507B. Moreover, according to petitioner's own expert witness, the two principal stockholders during the same years drew out an additional $60,000 in unearned salaries! R. 3555; Ex. 5127. This was during a five-year period in which investment in advertising totaled only $27,293. Ex. 507B.

Petitioner's steadily declining profits during the complaint period were not only the result of lower sales, but also of sharply increasing costs. In October 1960 petitioner committed itself to build a new bakery.[2]

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[1] In point of fact, petitioner's pretax earnings dropped from $54,000 to $32,000. Ex. 507B.

[2] Significantly, this decision to invest in new plant and equipment was reached well after Continental had acquired Love's, and after many of the events occurred which petitioner has in this litigation been claiming caused its losses. Moreover, the decision was pursued to completion during the rest of the period in which petitioner now claims for purposes of this litigation respondents were intending to destroy it.

R. 2830, 4135-37. The new building was completed in mid-1961, but from July 1961 to April 1962 it lay unused awaiting delivery and installation of equipment. R. 3918-27, 4139-40; Exs. 5141, 5142. Thus for almost all of the complaint period petitioner was carrying the costs of two plants. R. 3014. In addition, petitioner purposely leased more land for the new plant than was necessary in order to rent out the excess, then was unable to do so. R. 3108-09. The consequence of the decision to build a new plant, and the result of the long delays, was that fixed charges to petitioner for rent, depreciation, and interest alone increased from $12,659 in 1959 to $41,241 in 1962. Ex. 5169; R. 4133. And by the time petitioner finally got the new plant in operation in mid-1962, a new competitor had entered the market and petitioner did not have enough sales to use it efficiently.

The competitive effectiveness of Love's as compared to petitioner's do-nothing merchandising policies while its owners milked the company and incurred sharply higher costs is just one aspect of this litigation. The most significant fact of this lawsuit is that in November 1961—while petitioner's new plant sat idle awaiting delivery of equipment—the bread market in Honolulu experienced the entry of a dynamic new competitor, Holsum Baking Company. Within a matter of weeks Holsum had 30 percent of the wholesale bread sales in Honolulu, petitioner's sales were cut from $30,000 to $20,000 per month, and Love's found itself "fighting for our lives." R. 1410, 1704-05, 1833, 1994; Ex. 988A.

C. The Entry of Holsum Baking Company and Its Consequences in the Market

Holsum came into the market with a broad line of bread and roll products. It featured a "balloon," or expanded, loaf which was a new variety of bread in Honolulu, though common on the mainland. The loaf is softer than ordinary bread. Holsum's expanded loaf was immediately popular with Hawaii consumers and soon became the leading seller in the market. R. 1704-07, 1708, 1833, 3907-10, 3192.

To back up its entry Holsum embarked upon an advertising campaign estimated at the time to be running at a rate in excess of $300,000 per year (this may be compared, for example, with Love's own expenditures of $82,000 in 1960). In all other respects Holsum was an effective competitor. It maintained a consistently high investment in advertising. It trained its salesmen, controlled their routes, and effectively supported their efforts through various merchandising programs. It promoted varieties. It distributed its bread throughout the market. And it bid for and received military contract business. R. 511-12, 1409, 1592, 1661, 1761-62, 1989-90, 3597-99; Exs. 5018A-U, 5130-32.

Holsum's entry was by any measure successful. Throughout 1962 and up to the time of trial in 1966 Holsum remained a vigorous competitor in the Honolulu market. Its sales in fiscal 1964 were $2,500,000 and in fiscal 1965 they increased to $2,760,000. Its earnings position improved every year and by fiscal 1965 profits were $101,200 after taxes. Exs. 3767, 5130-32.

Petitioner's principal witnesses were forced to admit that the company did absolutely nothing to meet the

new competitive conditions brought on by Holsum's entry. Petitioner's management was urged by its salesmen to produce the expanded loaf, but it refused. Love's offered to sell to petitioner at giveaway prices (eleven dollar pans for one dollar) the only equipment petitioner needed to get into production of expanded bread, but still petitioner refused. Petitioner's advertising expenditures in 1961 were a paltry $212 and the company did not engage in any other promotional efforts to respond to Holsum. R. 1708, 3073, 3079, 3099, 3392-93, 3894-98, 3905, 4007, 4126-29.

Petitioner never recovered from the impact of Holsum. After the immediate loss of one-third of its sales petitioner's sales continued to decline. Ex. 988A. Its new plant was not in production until five months after Holsum came in. Ex. 3565; R. 1712. By then its sales volume was only slightly more than half what it had been. With the increased charges from this new and largely idle plant, and with no improvement in sales, petitioner's losses began to pile up. In December 1962 the company's two principal shareholders, one a lawyer and the other an accountant, doubled their stock interest in the company (without investing any new money) (R. 3931) and in January 1963 they filed this action.

D. The Acts Complained Of

Petitioner's complaint was that the acquisition and all of Love's promotional efforts since the acquisition were unlawful. It then pointed to the losses it incurred and loosely asserted that the losses were caused by the complained of acts. The facts of record disclosed the total failure of petitioner's proof, as determined by the jury.

(i) *The Acquisition of Love's by Continental—May 1960.* Petitioner was permitted throughout the trial to introduce documents and to interrogate witnesses in an effort to show that the acquisition by Continental in 1960 was improperly motivated or that it had an impact on petitioner's business or upon competition generally. Petitioner's problem was not any ruling by the trial court but rather its lack of evidence in support of the contention.

The correspondence written by officers of Continental concerning the acquisition of Love's was introduced into evidence. It comprised perfectly business-like communications having not even the faintest overtones of anticompetitive aims. *E.g.,* Exs. 510, 515, 814. The evidence established that Love's was a highly efficient organization, regarded by Continental as located in a growing market with ample opportunity to expand its business as more consumers were weaned away from rice.

There was no evidence that the acquisition of Love's assets had any effect on the market, nor was there any evidence that Continental was a potential independent entrant into the Honolulu bread market. Certainly entry by other firms was not impeded by the acquisition. In addition to Holsum's entry, the market also experienced in 1961 the entry of Oroweat Baking Company, which within a short time enjoyed substantial sales. R. 614-16; Exs. 3760-61.

Petitioner sought throughout the trial to show that Continental subsidized and thereby made possible Love's promotions after the acquisition, but the record is completely contrary. Love's consistent profits have already been noted. The documents show also the very

opposite of subsidization from Continental. For any kind of service received by Love's from Continental—such as entertainment or the supply of miscellaneous equipment—Love's was billed. *E.g.*, Exs. 872-79. In addition, Love's paid a substantial quarterly charge to Continental. This was an amount fixed each quarter by Continental and represents Love's assigned share of Continental's general office overhead. The amounts thus billed by Continental and paid by Love's ranged between $15,000 and $23,000 per quarter. Exs. 870-79. In addition, Love's paid a substantial yearly dividend to Continental. Exs. 571-73. There is no evidence anywhere in the record of money flowing the other way.

The record is clear that Mr. Edwards and his staff continued to operate as they had prior to the acquisition on all matters of advertising, promotion, etc., having any relevance to this litigation and that all decisions of any competitive consequence continued to be made by Mr. Edwards. Love's continued to purchase its supplies independently and continued to decide independently what products to produce and how to promote them. The contemporaneous documentary record established that so far as Continental was concerned Love's business was to be "operated wholly in Hawaii" under the direction of its former management. Ex. 814. The Continental home office staff was cautioned for this reason to check carefully before sending even routine requests for information to Love's. *Ibid.* From time to time Continental personnel were called upon for advice, as when Mr. McNary visited Honolulu early in 1962, but Love's management continued to make all the decisions. The testimony was consistent with the documentary record. R. 1212, 1217-18, 1278-79, 1300-01, 1329-30, 1417-19, 1655-56, 1771, 1780.

(ii) *Post-acquisition Activities.* During the year and a half between the acquisition by Continental and the entry of Holsum into the Honolulu market Love's attempted—unsuccessfully—to market in Honolulu a bread made by a new process under the name "Magic Mix"; it conducted a bread-of-the-month advertising campaign in which various old and new special variety breads were featured; it introduced a few bread, cake, and frozen food items under Wonder and other Continental trade names; and it met a promotional allowance given by a competitor to one food chain, Foodland. After Holsum's entry into the market with its expanded loaf, Love's introduced its competitive loaf, the "Soft Rolled" brand, and advertised it so as to arrest the alarming losses of sales caused by Holsum's entry.

Whether Love's activities were unlawfully motivated or, alternatively, were excessive or inconsistent with normal business practice, was fully ventilated at the trial. The jury was instructed that a monopolist could not pursue "predatory" or abnormal or unreasonable competitive activity. The jury's verdict demonstrates that it found no fault with these actions of Love's.

ARGUMENT

This case involves no important or novel antitrust law principle. It raises no issues that are of substantial significance beyond the confines of this case. It presents a unique factual record that is unlikely to be repeated. Contrary to petitioner's argument, the decisions below present no conflict with prior decisions of this Court.

After a full trial and fair and proper instructions, a jury determined that respondents had not violated the antitrust laws. The judgment entered on the jury

verdict was affirmed per curiam by the Court of Appeals on the ground that the facts were so clear that even the submission to the jury of the issue of whether "illegal activity" of respondents had caused any injury to petitioner was not justified. Even on petitioner's reading of the Court of Appeals' opinion,[1] in order for petitioner to prevail in this litigation it would have to show *both* that the District Court erred in its handling of the violation issue *and* that the Court of Appeals erred in its treatment of the proximate cause issue. Petitioner can make neither showing on the facts of this case and review by this Court is not warranted.

I. THE DISTRICT COURT JUDGMENT FOR RESPONDENTS IS NOT IN ERROR

A. The Court's Instructions Were Fair and Proper

Petitioner's assertions of violation of Section 2 of the Sherman Act[2] involved the offenses of actual mo-

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[1] Petitioner reads that opinion as dealing only with the proximate cause issue, one the jury did not reach. On the other hand, the reference in the opinion to "illegal activity" suggests that the court was focusing on the very issue decided by the jury, the issue of violation *vel non*, and was saying that not only was the jury verdict justified but that respondents' motion for directed verdict on this issue should have been granted.

[2] Petitioner argues that the trial court's ruling dismissing Count 1 of the second amended complaint, which purported to allege a violation of § 7 of the Clayton Act, is inconsistent with Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967). The district court's ruling should not be read inconsistently with *Dailey*.

In *Dailey* the court concluded that the allegations of the complaint stated sufficient causal relationship between the merger and the damage complained of to warrant a trial. In the present case the second amended complaint actually negatived any such showing by alleging at great length that the fact of the acquisition had not changed anything. Injury was caused, according to the

nopolization, conspiracy to monopolize, and attempt to monopolize. The court carefully delineated the substance of these different offenses in its charge, and the jury found for the respondents on each offense.

Actual Monopolization. Regarding this claim the trial court first told the jury that proof that either defendant had monopolized would be sufficient and that, as a practical matter, the parent-subsidiary relationship made it unnecessary to distinguish sharply between the two. R. 5009-10. The court then defined the proscribed monopoly power as the power over price and/or the power to exclude competitors from the market or prevent the successful entry of a competitor into the market. R. 5010-12.[2]

Notwithstanding petitioner's assertion that the trial court's instructions did not grant any legal significance to respondents' asserted monopoly power, the jury was pointedly told that the mere existence of the power to control prices or to exclude competition when it is desired to do so, coupled with the general purpose and intent to exercise the power, results in monopolization. R. 5012. *United States* v. *Grinnell Corp.*, 384 U.S. 563;

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complaint, by a continuation of the merchandising acts and policies allegedly begun years before the acquisition and continued thereafter, not because of the acquisition but in spite of it. Cr. 156-58.

Moreover, the trial court's ruling in this case did not result in the exclusion of any evidence, and the record bore out the lack of any causal relationship. It showed that Continental did not subsidize any of Love's expenditures and that Love's continued to be run by the same people after the acquisition exactly the way it had been run before.

[2] This is the standard definition, supported by ample authority. *See, e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391; United States v. Griffith, 334 U.S. 100, 107.

United States v. *Griffith, supra.* This being an action for damages, the court correctly stated that it must be shown that the power—if it existed—was exercised. This was accompanied by an instruction that any use of such power, "no matter how they got it, if they use that for the purpose of excluding competition or gaining an unfair competitive advantage, or to destroy a competitor, then that is unlawful." R. 5013.

The jury was told that the law did not necessarily prohibit Love's and/or Continental from engaging in "ordinary competitive activities which are normally engaged in by any company" and that Love's could, for example, make "normal and reasonable" advertising expenditures. R. 5014. The court went on, however, to say that if either respondent did have monopoly power in the market it could not pursue advertising and merchandising policies that were *either* "in fact, excessive and inconsistent with normal business decisions" *or* "even though not excessive or abnormal . . . were formulated with a purpose and design to cripple competition or exclude it from the market." R. 5016. Further, the jury was told that aside from any actual intent on the part of the defendants, they had violated the law if, having monopoly power, they "knew or should have known that the necessary effect of its acts and policies which are here challenged would be to eliminate or prevent competition . . . ." R. 5017.

Finally, the jury was told that "the employment of means, in and of themselves lawful" becomes unlawful if "done for the purpose and intent to use monopoly power." In such circumstances "even lawful acts become unlawful." R. 5018-19.

Conspiracy to Monopolize. The court distinguished the charge of a conspiratorial attempt to monopolize

from the claim of actual monopolization and instructed that under the conspiracy claim petitioner need not show that the desired end of monopoly power was obtained. R. 4999-5001. Addressing itself to the issue of parent-subsidiary conspiracy, the court told the jury that it was not unlawful for representatives of Continental and Love's to discuss and agree upon the normal conduct of Love's business; but that if "any or all of such apparently normal business relationships and acts . . . were, in fact, implementation of a mutual agreement or plan or scheme or conspiracy or attempt to monopolize" the market, a violation of the antitrust laws would be made out. R. 5002.

Attempt to Monopolize. On this allegation the court charged that to establish a claim of attempt to monopolize against either respondent petitioner had the burden of showing a specific intent to monopolize and some act done in furtherance of that intent. The court further charged, as requested by petitioner (R. 4635-36), that there must appear a reasonable probability that the monopolization will sooner or later occur. R. 5021.

With specific reference to Continental's acquisition of Love's, the jury was told that on the record of this case the acquisition was not, standing alone and in and of itself, unlawful. It was further told that petitioner was entitled to have the evidence considered as a whole, to have the "full benefit of its proof in the light of the entire picture presented" (R. 4987), and that if the jury found

> "that the acquisition was made for the purpose of or in furtherance of any conspiracy of the parties to monopolize, or an attempt of the parties to monopolize, or resulted in monopolization of the bread and bread-type rolls market in Honolulu,

then the acquisition would therefrom and thereby become unlawful." R. 5022-23.[1]

B. The Evidentiary Rulings Were Proper

Petitioner also complains of various evidentiary rulings of the trial court, placing particular emphasis on the exclusion of a consent order issued by the Federal Trade Commission.

The consent order, Ex. 581, was the result of a complaint by the Commission in 1960 that three acquisitions by Continental in 1958, involving baking plants in six cities in the continental United States, violated Section 7 of the Clayton Act. The issues that for a time were litigated with the Commission's staff were simply whether the acquisitions might substantially lessen competition in each of the separate marketing areas in which the acquired company had a baking facility. Hearings were held in four of the markets; no hearings were held, and no record was developed, on the other two. R. 2749.

The consent order itself stated that it was not to the effect that Continental had violated any law. Indeed, the supporting Appendix, included in Ex. 581, recited that of the three acquisitions challenged, two were lawful. Continental agreed to divest the third, but there was no finding that even that acquisition was unlawful.

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[1] Petitioner asserts that it was error for the trial court to "immunize" the acquisition of Love's. But the quotation from R. 5022-23 immediately above shows this objection is not supported by the text of the charge.

The court's instructions as to the purpose of the Sherman Act (Tr. 4990-93), complained of by the petitioner (Pet., p. 28), are accurate, especially in the context of instructions making it very clear to the jury that at issue was whether respondents' competitive activities were unlawfully motivated or excessive or abnormal.

The trial court found that Love's acquisition was never challenged or litigated in the Commission proceeding and that therefore any Commission order arising out of those proceedings was wholly irrelevant to the issues in this litigation. R. 2753-54. This was plainly correct. *E.g., Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir. 1964), *cert. denied*, 379 U.S. 888; *Park Neponset Corp.* v. *Smith*, 258 F.2d 452 (1st Cir. 1958); *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F.2d 721 (10th Cir. 1955).

Because the ruling was on relevance grounds, there was no reason for the trial court to consider, and it did not consider, whether the consent order met the requirements of Section 5(a) of the Clayton Act.[1]

Similarly, petitioner's complaint that a memorandum prepared by an advertising agency employee, Ex. 601, was not admitted against respondents is without merit. In the first place, the exclusionary ruling was largely vitiated by the fact that the trial court permitted ques-

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[1] In fact, there are two reasons why the consent judgment was not admissible under § 5(a). First, the order creates no "estoppel" against Continental. The order itself recites that there was no finding that Continental had violated any law. Section 5(a) renders a prior judgment admissible only as to questions "distinctly put in issue and directly determined" in the prior proceeding. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569.

Second, a Commission order is not a "final judgment or decree" within the meaning of § 5(a). Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15 (E.D. Mo. 1963), *aff'd*, 327 F.2d 725 (8th Cir. 1964). Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, is not to the contrary. That case dealt solely with an interpretation of § 5(b) of the statute, and this Court was careful to distinguish the entirely different issue raised under § 5(a). 381 U.S. at 316-18.

tioning for days on end during which, as the petition itself shows (Pet. 20), petitioner's version of the memorandum was put before the jury. R. 1225-59, 2039-74, 2275-2308, 2465-2629. Moreover, in spite of being afforded full opportunity for examination, petitioner was never able to show that the exhibit had ever been adopted by either respondent.

There is no more merit in petitioner's other contention that evidence relating to claimed violations of Section 2(a) of the Robinson-Patman Act was improperly excluded. As for Love's restaurant prices on buns and rolls, petitioner put into evidence the prices quoted in 1957, long prior to the acquisition and to the damage period involved. This was admitted into evidence on petitioner's representation that petitioner would submit proof that these prices were designed to exclude Snowflake Bakery (not petitioner) from the bun and roll business. No such proof was ever tendered by petitioner, so the trial court struck the evidence. As for Continental's prices from its West Coast plants on bread sold under the Wonder label, the facts were that before the acquisition there was a one- or two-cent difference between these prices and Love's prices in Honolulu, and the acquisition did not result in any reduction in Love's prices. In addition, Love's prices actually were higher than those quoted by petitioner and there was not even an offer to prove how they could have caused any injury to petitioner.

II. THE COURT OF APPEALS' JUDGMENT IN FAVOR OF RESPONDENTS IS NOT IN ERROR.

A. The Court Would Have Been Correct in Concluding That Petitioner's Failure to Prove Any Connection Between the Claimed Wrong and Injury Required Judgment for Respondents

Petitioner construes the Court of Appeals' opinion as dealing solely with the proximate cause issue and argues that that court erred in holding that there was insufficient evidence to justify the submission of this issue to the jury. It is not correct to construe that opinion as excluding the issue of violation from the scope of the affirmance. However, even if the opinion is so limited, there was no error on the facts of this case.[1]

Petitioner's sales had been declining since 1957. During the complaint period they continued to decline, except in 1960, the year in which the acquisition took place, when they stayed even. After Holsum's entry in 1961, petitioner's sales went down at a faster rate. There was never any proof offered that even remotely connected these sales losses to acts of respondents. No case cited by petitioner even suggests that its case can be made out simply by showing alleged wrong and unconnected injury.

If the truth were that Love's routine promotional efforts in Honolulu had had any impact upon petitioner's business, the proof would have been available. Witnesses were readily available in Honolulu from

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[1] Even if this Court should conclude that the court of appeals has not already affirmed the trial court's judgment on the violation issue, it is clear that petitioner's attacks on that judgment are so lacking in merit that on remand to the Court of Appeals that court would affirm the judgment on the jury verdict of no violation.

Foodland and other supermarkets, restaurants, military contract purchasers, etc. Petitioner called none, though respondents did. Petitioner's own books and records, from which any losses occurring contemporaneously with any complained of promotions could have been shown, if they existed, in fact showed continuing losses since 1957, sharp losses after November 1961 due to Holsum's entry, and weekly sales declines wholly unrelated to the dates of any of Love's promotions or so-called new variety introductions. Exs. 998A; 3690-91. On this record *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, relaxing the required proof of causation in circumstances where plaintiff's losses are unexplained except for defendant's acts, is plainly inapplicable.

Nor is there any basis for the claim that the Court of Appeals' action conflicts with *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690. This Court there held that the jury could determine that a plaintiff's inadequate supplies of a raw material and consequent injury were due to defendants' concerted action to monopolize this material and to refuse to sell it to the plaintiff. Here, contrary to *Continental Ore,* the Court of Appeals was not of the opinion that a violation of law had been made out. And here the court, again contrary to *Continental Ore,* made no restrictive ruling that could serve as a limiting precedent for future cases as to the quality of proof necessary to show impact on the plaintiff of established violations of the antitrust laws.

Petitioner's position appears to be, citing a footnote in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696 n. 12, that its evidence on proximate cause was sufficient because, in its words, "proof of defend-

ants' intent to exclude him is sufficient for the plaintiff to obtain a judgment . . . that his exclusion was caused by defendants."[1] (Pet., p. 32). This asserted anti-competitive intent of respondents is emphasized throughout the petition (Pet. 15-24, 29, 30, 31, 34, 36) and is argued as sufficient to make up for petitioner's failure to prove any facts showing a connection between alleged wrong and injury. Petitioner ignores the fact, however, that this very question of respondents' intent was presented to the jury and was resolved in favor of respondents. *See* pp. 16-18, *supra.* Thus, it is clear that the jury rejected petitioner's case as he himself defines it and that, even if petitioner's reading of the Court of Appeals' per curiam decision were correct, there was no prejudice. For it is the jury finding, not any asserted error of law, that militates against any recovery by petitioner in this litigation.

B. The Judgment Was Proper From a Procedural Standpoint

Petitioner's claim that the Court of Appeals' opinion conflicts with the Seventh Amendment is based on its reading of that opinion as dealing only with the proximate cause issue. We have already noted that the opinion should not be so construed. In any event, even if petitioner's narrow reading were correct, the opinion does not conflict with the Seventh Amendment, and is well within the authority of the Court of Appeals.

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[1] In fact, *Utah Pie* dealt only with the question of whether plaintiff had presented sufficient evidence to satisfy the statutory standard of the Robinson-Patman Act relating to possible injury to competition. Whether the plaintiff there had satisfied the more stringent requirement of proving that its injury had been caused by defendants' unlawful acts was not before the Court.

The short and complete answer to petitioner's Seventh Amendment argument was given by this Court in *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 321-22:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See *Baltimore & Carolina Line, Inc.* v. *Redman,* [295 U.S. 654]."

Here, the Seventh Amendment would not have barred the trial court from granting a directed verdict to respondents; even if the Court of Appeals' opinion were to be construed (erroneously) as a grant of that motion, the Seventh Amendment would not have been violated.

Nor was there any violation of Rule 50 of the Federal Rules of Civil Procedure. Rule 50(b) provides for the filing of a motion for judgment n.o.v., along with a motion for new trial, by a movant for directed verdict who receives an adverse jury verdict, and it does not contemplate the filing of an n.o.v. and/or new trial motion by the party who prevailed on the jury verdict, as petitioner urges respondents were required to do. Common sense would be offended were the party prevailing on a jury verdict required to move to set aside the jury verdict, and the demands on trial courts would be greatly increased if they were required to render advisory opinions on numerous legal issues, rulings on which were made unnecessary by the jury verdict.

The propriety of the Court of Appeals' action is supported by consistent authority to the effect that a

prevailing party is not required to notice an appeal or take any other action in order to be in a position to urge in support of the judgment in his favor any ground for which there is record basis. *Jaffke* v. *Dunham,* 352 U.S. 280; *Langes* v. *Green,* 282 U.S. 531. Even where the district court rejected an appellee's argument but found for it on other grounds, the appellee can urge this very argument on appeal in support of the lower court judgment. *United States* v. *American Ry. Ex. Co.,* 265 U.S. 425; *Stroud* v. *Brown,* 254 F.2d 448 (4th Cir. 1958), *cert. denied,* 358 U.S. 817. A fortiori, appellee can urge on appeal an argument made at the trial level but not passed on by the trial court. In both of these situations, courts of appeals can, as the Court of Appeals did here, affirm the trial court judgment on grounds other than those relied on by the trial court.

This result is also dictated by the federal harmless error rules, 28 U.S.C. § 2111 (1964), and Rule 61 of the Federal Rules of Civil Procedure. If a court of appeals determines that a verdict should have been directed notwithstanding that there is error which vitiates the jury verdict,[1] the substantial rights of the

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[1] We repeat that here the Court of Appeals did not find that there had been any error in the trial court which would not permit the jury verdict to stand. *Compare* Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841 (5th Cir. 1959), relied on by petitioner (Pet. 41). In *Thurber* the court felt it was suggesting a meaningful procedure in remanding with an opportunity for appellee to move the trial court within ten days for judgment n.o.v. Plainly, however, where the appellate court is of the opinion, as this one was, that the record would not support any ruling other than a grant of that motion, such a procedure would be meaningless. Implicit in the appellate court's holding that judgment should be for the appellee is consideration of the new trial question and the conclusion that no reason exists for the trial court to consider such a motion. This disposition is clearly within the statutory authority of courts of appeals for the reasons stated in the text.

parties are not affected if the court of appeals so orders. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 289 F.2d 86 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 690. In that situation the court of appeals has authority to determine whether to order the entry of a verdict or to remand for a new trial, or it can remand the case to the trial court to make this determination. 28 U.S.C. § 2106 (1964); *cf. Neely* v. *Eby Construction Co., supra;* Fed. R. Civ. P. R. 50(d). The authority thus extends to avoiding a meaningless second trial.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 903

BAILEY'S BAKERY, LTD.,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that this Court grant a rehearing of its Order of February 24th, 1969, denying the Petition for Writ of Certiorari and that Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition docketed herein by petitioner on January 4th, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner submits as reasons for granting a rehearing and issuing a writ: 1) that as shown in the paragraphs below intervening circumstances of substantial effect have taken place since the filing of petitioner's Petition for Writ of Certiorari on January 4th, 1969, and 2) that as shown in the paragraphs below that substantial grounds available to petitioner not previously truly presented should be presented so that this court's approval of and encouragement of private enforcement of the anti-trust laws as an *"ever present threat"* to deter anyone contemplating business behavior in violation of the anti-trust laws, *Perma Life Mufflers* v. *International Parts Corp.*, (1968) 392 U.S. 134, will be meaningful and not futile. Continental Baking Company and its parent International Telephone and Telegraph Corporation, as shown hereafter, has made mockery of this court's attempt to encourage private enforcement of anti-trust laws. It blows hot and cold depending on its conflicting conglomerate purposes.

I.

Trial Court by a Decision Dated January 16th, 1969, in Effect, Reversed Itself on Question of Availability of Damage Claim for Clayton 7 Violation; Conglomerate I T & T Cannot Take Inconsistent Positions in United States Courts and Make Mockery of Justice.

After petitioner Bailey's Bakery, Ltd. filed on January 4th, 1969, its Petition for Writ of Certiorari in this cause on *January 16th, 1969,* the same district judge Honorable Martin Pence who presided in this cause in the trial court, filed a written opinion (yet unreported) in Civil No. 2754, in the United States District Court of Hawaii in a case entitled International Telephone and Telegraph

Corp. v. General Telephone and Electric Corporation and Hawaiian Telephone Co. and reversed its fundamental holding on the legal effect of an unlawful merger under Clayton 7, thus reversing itself on one of the main contentions of error made by petitioner. The decision of Judge Pence dated January 16th, 1969, was received in early February as an advance sheet in 1969 CCH Trade Cases Sec. 72691 and it could not have been called to this Court's attention in petitioner's Petition for Writ of Certiorari filed herein. A copy of the said January 16th, 1969 decision of Judge Pence is attached at the end hereof as Appendix G.

Attention is also called to the fact that on June 12th, 1968, the same International Telephone and Telegraph Co. (hereafter referred to as IT&T) and respondent Continental Baking Co. entered into a merger agreement under which Continental Baking Company would become a wholly owned subsidiary of IT&T. A copy of a page from Standard and Poor's Corporations "*Listed Stock Reports*", dated July 3rd, 1968, is attached hereto as Appendix H showing the above merger agreement. The agreement has been consummated. The said decision clearly shows that IT&T and Continental Baking Company parent and subsidiary are in strange opposite positions. In this case IT&T defends a bakery merger but it attacks General Telephone and Electric Company's merger with Hawaiian Telephone Company. Conglomerates may be permitted to engage in strange and irreconcilable conflicting business relationships but a conglomerate parent and subsidiary should not and cannot be permitted to represent to two different federal courts (one being this Supreme Court) two opposite inconsistent legal positions. Their actions make mockery of justice.

IT&T on October 18th, 1967, sued General Telephone and Electric Corporation and Hawaiian Telephone Co. in the United States District Court of Hawaii alleging that the merger of General Telephone and Hawaiian Telephone was illegal under Clayton 7 and sought injunctive relief in that by said merger IT&T will not be able to sell telephones and other equipment to Hawaiian Telephone Co. Judge Pence in his decision of September 21st, 1964, in this cause, Appendix B attached to petitioner's Petition for a Writ of Certiorari (pages 2 to 33) held that an illegal merger under Clayton 7 was only a momentary wrong, as follows:

> "The prohibitory sanctions of Clayton 7 *are triggered to explode by and at the moment of acquisition.* That, after the moment of acquisition, subsequent business practices do injure competitors in that market does not, because of subsequent injurious acts, give rise to a claim for treble damages under Clayton 7." (page 18 Appendix B). (emphasis ours)

But the same Judge Pence in his decision of January 16th, 1969, in International Telephone and Telegraph Corporation v. General Telephone and Electric Corporation and Hawaiian Telephone Co. viewed the same wrongful violation of Clayton 7 as a *continuing wrong* as follows:

> "The prospective language of Clayton 7, in combination with and when construed in the light of the Supreme Court's opinion in *du Pont, bring such acquisitions into the ambit of continuing violation. Accordingly, the instant acquisitions may be challenged at anytime within (and at least for four years after) the span of such alleged violation.*" (emphasis ours)

Therefore the "instant" and momentary concept has been discarded by the trial court. This court should follow the continuing violation rule and furthermore Judge Pence in his decision in the IT&T case in encouraging private enforcement of the antitrust laws stated as follows:

> "The force of the policy favoring private enforcement of the antitrust laws was again emphasized by the Supreme Court in Perma Life Mufflers v. International Parts Corp., (1968 Trade Cases Sec. 72486) 392 U.S. 134, 139 (1968) when it stated:
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> > '* * * the purposes of the antitrust laws are best served by insuring that the private action will be an *ever present threat* to deter anyone contemplating business behavior in violation of the antitrust laws.' " (emphasis ours) (See Appendix G)

Perma Life did not hold that the said *"ever present threat"* policy did not apply to Clayton 7 violations. It covered all violations including violations of Clayton 7.

It is submitted that Judge Pence below corrected himself of his error in the Bailey's Bakery case at the request of International Telephone and Telegraph Corp., parent corporation of Continental Baking Company which is also the parent corporation of Love's Biscuit and Bread Co., Ltd.

Is it proper for conglomerate International Telephone and Telegraph Corp. to blow hot and cold, depending on what its ultimate purpose is? Simple principles of legal honesty should apply to conglomerates like IT&T. Legal principles should not be conglomerated, depending on the conglomerate's position in court.

II.

That Courts Below Are Divided on Whether Treble Damage Actions May Be Maintained for Violation of Clayton 7; This Situation Must Be Corrected.

Upon a careful reading of petitioner's Petition for a Writ of Certiorari, it is not clear that Count I of the second amended complaint filed in the trial court based solely on violation of Clayton 7 was completely dismissed. See Ap-

pendix B, page 33, attached to Petition for Writ of Certiorari where the trial court clearly held

"Defendants' motion to dismiss Count I is granted."

In other words the trial court held that a treble damage claim may not be based on a violation of Clayton 7.

The lower federal courts do not all agree on this very important question, that is to say, there is a division of authorities on the question whether a treble damage suit may be based on a violation of Clayton 7. There is an uncertainty in this field as Justice Bell of the 5th circuit stated in *Dailey* v. *Quality School Plans, Inc.*, (C.C.A. 5) (1967) 380 F.2d 484, as follows:

> "In addition, Cowles urges that no cause of action lies for damages on the basis of a violation of § 7 of the Clayton Act. 15 USCA § 18. This is a question concerning which some uncertainty has crept into the law through the decisions. The better view to us is that § 7 is included in the term 'antitrust laws' as that term is used in § 4 of the Act. The Third Circuit has so stated although this particular argument was apparently not made. *New Jersey Wood Finishing Company* v. *Minnesota Mining and Manufacturing Company* [1964 Trade Cases ¶ 71,110], 3 Cir., 1964, 332 F.2d 346, aff'd *sub nom Minnesota Mining and Manufacturing Company* v. *New Jersey Wood Finishing Company* [1965 Trade Cases ¶ 71,449], 1965, 381 U.S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405. See also *Julius M. Ames Co.* v. *Bostitch, Inc.* [1965 Trade Cases ¶ 71,397], S. D. N. Y., 1965, 240 F. Supp. 521, where the argument was rejected; and Note, 64 Col. Law Review, 597 (1964). There are authorities to the contrary. *Gottesman* v. *General Motors Corporation* [1963 Trade Cases ¶ 70,900], S. D. N. Y., 1963, 221 F. Supp. 488, cert. den., 379 U.S. 882, 85 S. Ct. 144, 13 L. Ed. 2d 88; *Bailey's Bakery, Ltd.* v. *Continental Packaging Company*, D. Hawaii, 1964, 235 F. Supp. 705; *Highland Supply Corporation* v. *Reynolds Metal Co.* [1964 Trade

Cases ¶ 71,023], 8 Cir., 1964, 327 F.2d 725, in footnote 3, and on remand see *Highland Supply Corporation* v. *Reynolds Metal Company* [1965 Trade Cases ¶ 71,380], E.D. Mo., 1965, 245 F. Supp. 510. We see no escape from the logic that § 7 of the Clayton Act is an anti-trust statute within the scope and meaning of § 4 of the Act and so hold."

The uncertainty referred to by Justice Ball should be immediately clarified. This court has granted certiorari in private treble damage suits, where rulings below have threatened the effectiveness of private action as a vital means of enforcing the anti-trust policy of the United States. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, (1968) 392 U.S. 134, 88 S. Ct. 1981, 1983. The present increase of mergers is a matter of national concern. Lately public reaction is so against concentration by merger that even Congress is known to have the problem under consideration.

This is the first case before this court which squarely presents the issue. Bailey's Bakery, a small corporation, with annual sales of only $500,000 per annum challenges a merger of Love's Bakery and Continental Baking Co., having a total sales of a half billion dollars. While the case is pending, Continental was merged into IT&T, a four billion dollar conglomerate. Does a small organization have any more chance in this country if this court, while encouraging private suits and saying that it will grant certiorari in cases where effectiveness of private action is threatened, refuses certiorari in a case where a fundamental question whether a small business annihilated by a merger in violation of Clayton 7 may file a treble damage suit?

III.

Plight of the Small American Bakery, a Fight Between the Majors and Small Independents, Bailey's Was Annihilated.

Continental and Love's, Hawaii, filed in this court their reply to petitioner's Petition for Writ of Certiorari on or about February 5th, 1969. It states on page 3 thereof that "None of the management personnel and none of the policies of Love's, Hawaii, were changed". Petitioner absolutely differs but instead of going into an answering argument states that the failure of Bailey's Bakery, Ltd., is due to the very causes brought out by Judge Fox of the United States District Court for the Western District of Michigan, Southern Division in a price fixing case in which Continental Baking Company was a party defendant. The case is entitled *United States* v. *American Bakeries, Continental Baking Co., Dutch Treat Bakers, Inc. et al.,* (June 4th, 1968) 284 F.Supp. 864. At pages 869-870 of said opinion the court describes the plight of the typical small American independent bakery like petitioner Bailey's Bakery, Ltd. The court stated:

> "In applying all the factors mentioned in this case, the nature of the bakery industry in Michigan and elsewhere must be understood. The key feature of the Michigan market is the presence of four majors and eight independents. *This is important because of the disparity in size between the majors and the independents.* For example, the net worth of Campbell Taggart, one of the majors is $80,000,000; the total net worth of the eight independents is $6,000,000, or approximately 6½% of the net worth of a single major company. It now becomes clear why both attorneys from the independents and the Government concluded that the independents do not control the price of bread and bakery products in Michigan.

Testimony contained in The Report of the Committee on the Judiciary, made by its Subcommittee on Antitrust and Monopoly, 86th Cong. 2d Sess. 1960, entitled Administered Prices—Bread (hereinafter cited as Report), reveals some startling information. The Committee concluded at page 91 that the majors have at one time or another employed seven forms of discrimination in the bread industry: '(1) *provision of free bread and free fixtures;* (2) *stales "clobbering";* (3) *discounts and allowances;* (4) *use of secondary loaves in fighting brands;* (5) *money "over, under and through" the table;* (6) *selling heavier or better loaves of bread at the same price; and* (7) *product discrimination.* The effects of these forms of discrimination on the independent baker whose market is invaded by the large firms *have been a recurring theme through every account of the practices in the bread industry.*

'In addition, however, these discriminating practices serve as highly effective tools for the Big Eight in still another way. *They tend to prevent entry into monopolized markets by reducing expectations of potential profits in the monopolized market. The independent firm knows that by using these forms of discrimination, the Big Eight can destroy the independent by draining away his meager capital.'*

An example of the plight of the independent is the case of Schafer Bakeries, Inc. On October 13, 1960, Judge Ralph Freeman of the Eastern District of Michigan signed an order under Section 236 dismissing the proceedings of a 77B bankruptcy action. Net sales from that date until now have been $80,000,000; profits were $258,000, which is slightly more than one-fourth of one per cent of sales, a very thin survival margin. And if any one of the seven discriminatory practices is effectively employed, the effect on Schafer could be fatal.

The Report makes it clear that wherever major companies in multiples invade a local market they

control the price of bakery products, and the decision of the independents is whether to follow the lead of the majors or remain in a steady position of their own choice. *Failure to follow the lead of the major companies has often been extremely costly to independents, as the Report notes at pages 166-9.*

The expectation of the independents must be that if they fail to follow the price leader, the leader can and will rescind the increase before they can gain any significant benefit. However, the almost complete absence of rescission of price increases indicates that the independent bakeries are almost unanimous in their belief that in the local bread market the space of time between the increase is not sufficient to derive benefits by the independent remaining at his price level. Also, price-followership is often the simplest course of action *to avert the onslaught from majors of the practices mentioned supra.*

The significance of this information is in determining whether the public interest will be served by accepting the nolo contendere pleas, making it difficult for the State of Michigan to pursue its private treble damage action, but allowing the independents to continue in business without litigation expenses which may drive them out of business.

If any or all of the independents were to go out of business, the public interest would probably be damaged much more than if Michigan were not allowed the benefits of Section 5. 'The West Coast Story: A Case Study,' found on page 170 of the Report, illustrates how the price zooms once majors control the markets. Between 1953 and 1960, *'west coast prices have increased nearly twice as much as the national average.' This unusually sharp increase in price was accompanied by an extensive merger acquisition movement on the west coast.* The pattern of acquisitions is remarkably similar to the pattern of price increases. 'In no other region of the country is there to be found such a striking identity of price changes by competing

companies, both as to timing and as to the magnitudes of the changes themselves . . .'

'It is not unreasonable to suggest that the prevalence of a common course of action in raising prices in west coast markets may be closely related to the best level of concentration which has developed in those markets, *as well as to an acute awareness on the part of local independent bakers of their vulnerability to retaliation for any departure from such a course of action.* Indeed, there does not appear to be any other reasonable explanation for the extent to which west coast bread prices have risen above those in the rest of the Nation.' Report, at 178.

Thus, if the independents in Michigan are driven out, the same results as on the west coast may accrue. And I find the financial position of the independents precarious enough to make an extensive antitrust suit likely to drive one or more of them out of business. Other factors arguing for acceptance of the independents' nolo pleas are the fact that they have not been repeated violators, they are small, and not particularly powerful. These considerations, combined with the damage of competition should any of these defendants be driven out of business by expensive litigation, cause me to accept the independents' pleas of nolo contendere.

As to the majors, an entirely different situation exists. They are not small or weak, and litigation is not likely to put them out of business. Furthermore, as noted in the Report and evidenced by the cases, each of the majors has been fined on other occasions for antitrust violations.[2] Clearly there is a need for a

2. *U. S.* v. *American Bakeries, et al.*, B. B. 1592, Criminal No. 11676 (S. D. Fla.) April 11, 1961.

American Bakeries, nolo plea and fine of $5,000.
Ward Foods, nolo plea and fine of $5,000.

U. S. v. *Ward Baking Co., et al.*, B. B. 1593, Criminal 11677 (S. D. Fla.) April 11, 1961.

American Bakeries, nolo plea and fine of $6,000.
Ward Foods, nolo plea and fine of $5,000.

stronger deterrent with respect to the majors than has been provided in the past by their numerous nolo contendere pleas and consent judgments. Therefore, the request of the majors to change their pleas is refused." (Emphasis ours)

With relation to the above-listed seven forms of discrimination in the bread industry Bailey's was subjected to much greater discriminations as listed on pages 9, 10 and 13 of the Petition for Writ of Certiorari. Free shelving, thirteen fighting brands instead of one, balloon loaves, kickbacks to restaurants, money rebates to supermarkets, premium prizes, end label price fixing, excessive advertising, misleading advertising and other overreaching acts. How could a small corporation having only $500,000 in gross sales per annum fight back one of the majors in the industry with sales in excess of half a billion dollars? Bailey's officers felt it was useless to fight back. It was

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U. S. v. *Ward Baking Co., et al.*, B. B. 1618, Civil 4735 (S. D. Fla.).

American Bakeries, paid $12,000 damage settlement as to Count I, May 8, 1962; entered a consent judgment as to Count II on September 1, 1965.

Ward Foods, paid $12,000 damage settlement as to Count I; entered a consent judgment as to Count II.

U. S. v. *General Baking Co., et al.*, B. B. 1319, Criminal 12991 (N. D. Okla.) March 11, 1957.

Continental Baking, nolo plea and fine of $10,000.

Campbell Taggart (Rainbo), nolo plea and fine of $2,500.

U. S. v. *Freihofer Baking Co., et al.*, B. B. 572, Criminal 8874, (E. D. Pa.) January 9, 1942.

Continental Baking, nolo plea and fine of $2,000.

Ward Foods, nolo plea and fine of $1,500.

U. S. v. *New England Bakers Assoc., et al.*, B. B. 710, Criminal 1577 (D. Mass.) June 22, 1943.

Continental Baking, nolo plea and fine of $5,000.

Ward Foods, nolo plea and fine of $5,000.

Safeway Stores, Inc. v. *F. T. C.*, 366 F. 2d 795 (C. A. 9, 1966) cert. den. 386 U. S. 932, affirming a price-fixing finding by FTC against Continental Baking.

(Apparently the first three cases in this series arise out of the same fact situation.)

annihilated. The above-mentioned pattern of operation by the majors made it useless for the small bakeries to fight back.

IV.

Entry of Holsum in Market a Foreseeable Intervening Force; Wrongdoer Cannot Blame Intervening Force and Free Itself of Liability.

Much is said by respondents of the entry of Holsum into the market in November, 1961. Petitioner first contends that Holsum entered the market after September, 1961, when Petitioner was already operating below its break-even point. (See page 21 of petitioner's petition for certiorari.) Petitioner was already down and damage had been done.

Furthermore, respondents foresaw that Holsum was going to come into the market when respondents acquired Love's, Hawaii, in May, 1960. See letter of January 29th, 1960, by Judge Steadman to the shareholders of Love's, Hawaii, on page 16 of petition for writ of certiorari. The threat was characterized as a "real" threat and it was one of the reasons why Love's, Hawaii, sold out to respondents.

One need not quote elementary tort law that a foreseeable intervening force does not excuse a wrongdoer of his wrongful acts.

CONCLUSION

It is therefore prayed that a rehearing be granted and a writ of certiorari allowed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds in Rule 58 of the Rules of this court.

By .....

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APPENDIX G

[¶ 72,691] International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. and Hawaiian Telephone Co.

In the United States District Court for the District of Hawaii. Civil No. 2754. Filed January 16, 1969.

Memorandum Decision on Plaintiff's Motion to Strike the Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation

Pence, D. J.: Plaintiff is suing under Section 16 of the Clayton Act (Title 15 U.S.C. § 26) and Section 11 of Act 190 of the Hawaii Laws of 1961 for injunctive relief from defendants' alleged violations of the federal and state antitrust laws. Defendant General Telephone & Electronics (GT&E) has asserted the doctrines of laches and/or statute of limitations,[1] estoppel,[2] and unclean hands[3] as affirmative defenses to some or all of plaintiff's charges. Plaintiff has moved to strike these defenses as insufficient and immaterial as a matter of law. Plaintiff's motion was granted orally on August 2, 1968, and this is but the formal written decision thereon.

I. *Second Affirmative Defense: Laches and/or Statute of Limitations*

Paragraph 1 of plaintiff's prayer for relief requests that the following acquisitions of GT&E be adjudged violations of Sections 1 and 2 of the Sherman Act (Title 15

1. Second Affirmative Defense, Answer to Amended Complaint and Counterclaim (filed February 20, 1968), paragraphs 31-32.

2. Third Affirmative Defense, Answer, paragraphs 33-52.

3. Fourth Affirmative Defense, Answer, paragraphs 53-67.

U.S.C. §§ 1, 2) and Section 7 of the Clayton Act, as amended (Title 15 U.S.C. § 18):

1. 1950—GT&E acquired the capital stock of Leich Electric Co.;

2. 1954—GT&E acquired the stock or assets of Automatic Electric Company;

3. 1959—GT&E acquired the stock or assets of Lenkurt Electric Co., Inc.; and

4. 1964—GT&E acquired the stock of California Water & Telephone Company, West Coast Telephone Company, The Southwestern States Telephone Company, and Western Utilities Corporation (all referred to as the Western Utilities groups).

Defendant contends "such relief is barred by reason of laches *and* the statute of limitations (Section 4B of the Clayton Act . . .)." (Emphasis added.)[4] Defendant has abandoned this defense insofar as it relates to the 1964 acquisition of the Western Utilities group, which occurred within four (4) years of the filing of this lawsuit (October 18, 1967).[5]

Clayton § 4B[6] provides that any "action under [Clayton] sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued." Since plaintiff initiated this lawsuit solely under Clayton § 16 for injunctive relief, the § 4B statute of limitations applied to Clayton Act actions for money damages is, by its very language, not, per se, applicable to this proceeding.

4. Defendant has abandoned that portion of its pleading relating to § 22 of Act 190 of the Hawaii Laws of 1961, since plaintiff does not maintain that the listed acquisitions in any way violate that Act. (R. T. August 1, 1968 at 104-05.)

5. R. T. August 1, 1968 at 42.

6. Title 15 U. S. C. 15b.

Defendant's second affirmative defense is therefore limited to the equitable doctrine of laches, which, for the purposes of this action, defendant equates to the statute of limitations.

Defendant stated its position in the context of and relies primarily[7] on *Farbenfabriken Bayer, A. G.* v. *Sterling Drug* [1961 Trade Cases ¶ 70,106], 197 F. Supp. 627 (D. N.J. 1961): (*Id.* note 5, *supra.*)

> "When I say laches here, I am talking about laches in the sense of an equitable remedy being linked to a legal right, the equitable remedy being Section 16 linked to a legal right, which is Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act.
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> "The plaintiff isn't suing for damages. The one thing he is after is an equitable remedy of an injunction, divestiture, some equitable remedy. Now, it's linked to the legal rights given by statute, Clayton 7 and Sherman 1 and 2. Those legal rights in the Antitrust laws, Sherman 1 and 2 and Clayton 7, are subject to Section 4, statute of limitations, Section 4B, four years.
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> * * *
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> ". . . [W]hen I say laches now, I am talking about laches which is the four-year period, because it is the statute of limitations of the legal rights upon which they ask for the equitable remedy."

Plaintiff urges that an action for divestiture under the antitrust laws is timely if, at the time of filing, there appears a reasonable likelihood any acquisition will lessen competition, citing *United States* v. *du Pont & Co.* [1957

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7. Defendants have also pointed to *United West Coast Theatres Corp.* v. *South Side Theatres* [1950-1951 TRADE CASES ¶ 62,591], 86 F. Supp. 109 (S. D. Cal. 1949) (defendants counterclaimed for treble damages and injunctive relief under Clayton §§ 4 and 16, and the court applied the state statute of limitations to the prayer for equitable relief), and *Hoopes* v. *Union Oil Co. of California* [1967 TRADE CASES ¶ 71,997], 374 F. 2d 480 (9 Cir. 1967) (a suit for money damages only under Clayton § 4).

Trade Cases ¶ 68,723], 353 U.S. 586 (1957). Plaintiff maintains *du Pont* permits suit whenever "the acquisition threatens to ripen into a prohibited effect."[8] Defendant counters that *du Pont* is distinguishable since it was a government suit and immune from any laches defense. Defendant construes plaintiff's position as conceding that an acquisition which constitued a violation at the time made is subject to attack for laches, arguing that, at most, *du Pont* introduces a fact question (e.g., when the violation occurred) which precludes summary judgment as an alternative to a motion to strike.

Clayton 4B is limited to actions for money damages initiated under Clayton 4 or 4A by private parties or the federal government. Clayton 4B does not in any way specifically curtail or attach limitations to private suits under Clayton 16. If there is any such limitation on private equity proceedings, it can therefore only derive from case law.

Sterling Drug, supra, is the primary authority relied upon by defendant to support its position that the Clayton 4B four year statute of limitations for Clayton 4 actions is by case law transmuted into laches and made applicable to this equitable proceeding under Clayton 16. In that case plaintiff sued on September 28, 1955, for money and injunctive relief as a result of defendant's Sherman 1 violation. A companion opinion found that such violation (an unlawful combination and conspiracy in restraint of trade in pharmaceutical products) had terminated on September 5, 1941. Previously the court had dismissed plaintiff's treble damage claim, leaving only a Clayton 16 claim for injunc-

8. Plaintiff's Reply to Memorandum in Opposition to ITT's Motion to Strike the Second, Third and Fourth Affirmative Defenses (filed June 12, 1968) at page 2, and *du Pont, supra,* at page 597.

tive relief. In granting defendant's motion for summary judgment, the court said:

> "Section 4 of the Clayton Act . . . grants to 'any person * * * injured in his business or property by reason of anything forbidden in the antitrust laws' a right to maintain an action for treble damages. Section 16 of the Act . . . grants an *additional* right to maintain an action for injunctive relief 'against threatened loss or damage.' We are of the opinion that the equitable remedy available under Section 16 is *predicated* upon the legal cause of action created by Section 4. It is essentially an equitable remedy in aid of a legal right created by the statute. (Emphasis added.)
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> "The statute of limitations, by its express terms, applies only to actions at law and may not be invoked as a defense against a claim exclusively equitable. However, where the equity jurisdiction is invoked in aid of a legal right, or is predicated upon a legal cause of action, equity 'will withhold its remedy if the legal right is barred by the * * * statute of limitations.'" [1961 Trade Cases ¶ 70,106], 197 F. Supp. at 629.[9]

The history of sections 4, 16 and 4B does not permit this court to agree with the conclusion that a Clayton 16 claim "is predicated upon the legal cause of action created by Section 4." Private parties were originally granted the right to seek treble damages by the Sherman Act (passed July 2, 1890), which, however, did not establish the corollary right to injunctive relief. Congress reenacted the substance of the treble damage provision on October 15, 1914 as Section 4 of the Clayton Act. Significantly, Congress at that time made a concomitant expansion of the antitrust laws by giving private parties the right to sue for injunctive relief (Clayton § 16) separate and apart from any right

9. It should be noted that the court initially reached the opposite conclusion. See *Farbenfabriken Bayer, A. G.* v. *Sterling Drug* [1958 TRADE CASES ¶ 68,949], 153 F. Supp. 589, 594 (D. N. J. 1957).

to monetary recovery. It was not until July 7, 1955, that Clayton 4B, which pre-empted application of state statutes of limitation to the federal antitrust laws, was added.

While the right to such injunctive relief to redress antitrust grievances may be said to be "additional" to the right to damages in the sense that it may be conjoined therewith, it may also be an alternative. As the above history manifests, the equitable remedy of § 16 is in no way "predicated upon", incidental to or derived from the legal right of § 4. The two sections expressly create wholly independent remedies, in strikingly similar language. A litigant may pull either trigger of his shotgun independently, or, at his option, he may shoot both barrels together. This is abundantly clear from the instant complaint, in which plaintiff seeks only injunctive relief. No damage claim exists herein on which any equitable remedy could be predicated. Yet defendants have not challenged plaintiff's right to maintain this suit.

In *Sterling Drug* plaintiff originally sought *both* legal and equitable relief, and to support incorporation of the Clayton 4B four year limitations period into a laches defense applied to a Clayton 16 claim the court relied on the general principle that equity withholds its remedy when legal rights are barred. Moreover, the facts of *Sterling Drug* are markedly different from those alleged here. The violation in *Sterling Drug* consisted of a conspiracy among plaintiff's predecessors and the defendant and its predecessors, which included illegal contracts in 1920, 1923 and 1926, all of which terminated on September 5, 1941. The suit was filed in 1955. In contrast, the pleadings herein allege a cause of action growing out of successive and multiple acquisitions continuing to the year suit was brought. The prospective language of Clayton 7, in combination with, and when construed in the light of the Supreme Court's opinion in *du Pont*, bring such acquisitions into the ambit

of a continuing violation. Accordingly, the instant acquisitions may be challenged at any time within (and at least for four years after) the span of such alleged violation.

The Ninth Circuit's statement in *Hoopes, supra,* note 7, at 486, is particularly relevant:

> "Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements . . . Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is considered to have been episodic rather than continuous."

The *Sterling Drug* doctrine, as applied, is in direct conflict with and contravenes the meritorious principle that equitable defenses are unavailable to defeat rights which are statutory and/or in furtherance of a strong public policy.[10] The right of private individuals to enforce the antitrust laws is both statutory and advances an important public policy. The rationale of the policy encouraging such private enforcement is to permit private parties to supplement governmental action. Private proceedings inure to the public benefit by eliminating unlawful restraints from interstate commerce. While treble recovery under § 4 provides an incentive or bonus to encourage private litigants to undertake an arduous task, in a suit for equitable relief under Clayton 16 the private plaintiff does not receive any comparable cash benefit. The elimination of an existing violation increases competition, thus benefiting

10. *American Surety Company of New York* v. *Gold,* 375 F. 2d 523, 528 (10 Cir. 1967).

the public and concurrently the private plaintiff. The law does not require that the public undergo continued subjection to antitrust violations when a champion appears, merely because of the passage of time. Antitrust violations do not become sacrosanct with age, and immunized from attack, when the public good dictates the contrary.

The force of the policy favoring private enforcement of the antitrust laws was again emphasized by the Supreme Court in *Perma Life Mufflers* v. *International Parts Corp.*, [1968 Trade Cases ¶ 72,486], 392 U.S. 134, 139 (1968), when it stated:

> ". . . [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."

If a "morally reprehensible" plaintiff is not precluded from suing, certainly the contemplative, albeit tardy, one should not be subjected to harsher treatment. The private litigant, no less than the government, is entitled to the opportunity to ponder and evaluate the effect of acquisitions, and need not bull ahead indiscriminately to avoid the proscriptive doctrine of laches.

This court views the *du Pont* case as controlling. In that action the government sued in 1949 for alleged Clayton 7 violations resulting from du Pont's 1917-1919 purchase of a 23% interest in General Motors. The Supreme Court

squarely ruled on the question of whether that action was late, holding:

> "The Senate declared the objective of the Clayton Act to be as follows:
>
> "'. . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices . . . to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation*. . . .' (Italicized in original.)
>
> "'Incipiency' in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." (Footnote omitted.) [1957 Trade Cases ¶ 68,723], 353 U.S. at 597.

Defendant has not advanced any reason why this rule should not be available to private litigants in a like manner—especially in a proceeding such as this which is primarily enforcement. If the congressional intent is accomplished by permitting government action against acquisitions thirty years following consummation, then permitting comparable private actions advances the same purpose.

II. *Third Affirmative Defense: Estoppel*

Plaintiff has prayed that the court find GT&E's acquisition of (1) California Water & Telephone Company, The Southwestern States Telephone Company, and the West Coast Telephone Company in violation of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act, and (2) Hawaiian Telephone Company in violation of the above listed provisions of the federal law and §§ 2, 5 and 7 of Act 190 of

Hawaii Laws of 1961. Defendant answers that plaintiff had advance actual or constructive notice of all such acquisitions, did not oppose such acquisitions before the appropriate state regulatory agencies, and is accordingly estopped from challenging such mergers in this forum. Plaintiff counters with the contention that the equitable doctrine of estoppel is not available as a matter of law in defense of private antitrust actions. Defendant replies that Clayton 16 provides that private litigants shall be entitled to injunctive relief "under the same conditions and principles" as in "courts of equity", which incorporates the defense of estoppel into the antitrust laws. Plaintiff responds that Clayton 16 merely provides when injunctions shall issue, but does not affirmatively provide antitrust defendants with all possible equitable defenses. The court is unaware of any reported decision considering this question.

Plaintiff's motion to strike defendant's third affirmative defense is granted. Even accepting (without affirming) defendant's general position that the language of Clayton 16 incorporates all equitable defenses into the antitrust laws, nevertheless the specific equitable principle that estoppel is precluded as a bar to statutory rights, or rights advancing a strong public policy is overriding and controlling here. In *American Surety Co. of New York* v. *Gold*, *supra*, at 528, an action against an insurer to recover punitive damages levied against the insured in a personal injury case, the insurer acknowledged responsibility for the compensatory damages, but denied liability for the punitive award, asserting such recovery was contrary to the pertinent public policy. The Tenth Circuit stated the general rule:

> " 'The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.' " 375 F.2d at 528.

Defendant's third affirmative defense is gored by each horn of this principle. The challenged acquisitions are illegal only if forbidden by federal and state statute, and, as noted above, the public policy favors private enforcement of the antitrust laws.[11] On both grounds, therefore, this defense must fall.

The same result is reached under Hawaii law. In order to minimize judicial construction of the statutory language by reference to an existing body of case law, the Hawaii antitrust statute substantially, almost verbatim, incorporated the federal statutes into the state act.[12] Accordingly, defendant's defense of estoppel to plaintiff's state law claim is similarly stricken down.

III. *Fourth Affirmative Defense: Unclean Hands*

Defendant asserts that plaintiff (a) manufactures and sells communication equipment to foreign telephone companies, including Puerto Rico and the Virgin Islands; (b) acquired much of its telecommunication manufacturing capacity through illegal mergers; (c) has attempted to acquire domestic telephone operating companies; and (d) has acquired numerous companies not engaged in the communications industry—all of which constitutes unclean hands. Plaintiff insists such a defense is not available to antitrust defendants as a matter of law.

Although this defense is precluded in Clayton 4 damage actions,[13] whether or not it may be a defense in

11. See *Perma Life Mufflers, supra.*

12. Laws of Hawaii, Chapter 205A, §§ 1, 2.

13. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211 (1951).

Clayton 16 proceedings is not yet definitely settled.[14] While it would appear to this court that the Supreme Court's discussion of *in pari delicto* in *Perma Life Mufflers*, as noted above, is equally applicable to the defense of unclean hands in a Clayton 16 action in the context in which that defense is here raised, it is not necessary for this court to reach that issue.

As appears from defendant's stated grounds for this defense, the alleged unconscionable acts on the part of the plaintiff do not arise out of anything involved in plaintiff's suit.

> "Courts of equity . . . apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks *in respect of the matter in litigation.* They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." (Emphasis added.)[15]

Moreover, where, as here, a suit in equity concerns the public interest as well as the private interests of the litigants, the court is permitted to use its broadest discretion

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14. *Singer* v. *A. Hollander & Son* [1953 TRADE CASES ¶ 67,425], 202 F. 2d 55 (3 Cir. 1953); *Graham* v. *Triangle Publications* [1964 TRADE CASES ¶ 71,232], 233 F. Supp. 825 (E. D. Pa. 1964); and *Louisiana Petroleum Retail Dealers* v. *Texas Co.* [1956 TRADE CASES ¶ 68,566], 148 F. Supp. 334 (W. D. La. 1956). Cases contra are: *Hawaiian Tuna Packers* v. *International L. & W. Union* [1946-1947 TRADE CASES ¶ 57,587], 72 F. Supp. 562 (D. Haw. 1947); and *Magma Pictures Corp.* v. *Paramount Pictures Corp.*, 265 F. Supp. 144 (C. D. Cal. 1967).

15. *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 245 (1933).

in the application of the maxim,[16] and the determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

Plaintiff's claim is limited to GT&E's acquisitions. The facts pleaded by defendant's answer to support its defense of unclean hands do not relate "to misconduct in relation to the matter in litigation. . . ."[17] Therefore, even if the court felt that the plaintiff was guilty of misconduct, since that misconduct does not affect the equitable relations between the parties in respect to the issue posed for adjudication by the court, the defense of unclean hands has no application here. If plaintiff is also a violator of the antitrust laws, defendant's remedy lies in recourse to a separate proceeding (as is set forth in defendant's counterclaim).

The same result is reached with regard to defendant's fourth affirmative defense under the Hawaii antitrust law for the reasons stated in re defendant's Third Affirmative Defense.

Plaintiff's Motion to Strike The Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation is Granted. Plaintiff will prepare the necessary Order.

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16. *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 815 (1945). *Cf.* also *Graham* v. *Triangle Publications*, *supra* note 14, at 832, where Judge Higginbotham said:

> "Although the Third Circuit has in the past honored the defense in a private suit for injunction instituted under the antitrust laws (*Singer* v. *A. Hollander* . . . [*supra*]) it did not rely on the defense as the sole reason for dismissing the suit. If the unclean hands defense was the most persuasive argument for denying an injunction which should otherwise issue I would be inclined to hold under the facts and circumstances of this case that it would not be enough to thwart relief." (Footnote omitted.)

17. *Hoehn* v. *Crews*, 144 F. 2d 665, 672 (10 Cir. 1944), *cert. denied* 323 U. S. 773 (1944).

APPENDIX H

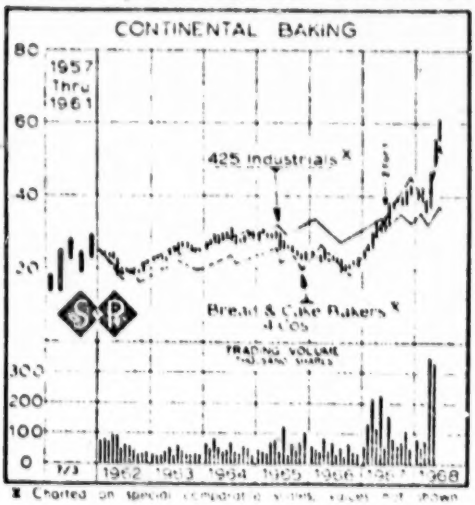
Appendix H

CI¹ 638

Continental Baking

Stock--	Approx. Price	Dividend	Yield
COMMON	58⅛	?---	?---
$5.50 PREFERRED	85½	?---	?---

RECOMMENDATION: This company and International Telephone & Telegraph Corp. have signed an agreement of merger under which, subject to approval of Continental's shareholders, Continental would become a wholly owned subsidiary of ITT. Terms call for the issuance of 0.72 common share of ITT and 0.25 share of ITT convertible preferred stock for each Continental common share. In addition, ITT would issue one share of its $5.50 non-convertible preferred stock for each share of Continental's $5.50 preferred.



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MERGER AGREEMENT

On June 12, 1968, International Telephone & Telegraph Corp. and Continental Baking announced jointly the signing of a merger agreement under which Continental would become a wholly owned subsidiary of ITT.

The proposed transaction is subject to approval of shareholders of the baking company and also to the fulfillment of "certain legal considerations."

The agreement is for ITT to issue 0.72 common share and 0.25 share of $4 cumulative convertible preferred, Series K, for each Continental Baking common share. The preferred so issued would be convertible into common at one share for $64 face value of preferred. In addition, ITT would issue one share of $5.50 non-convertible preferred stock for each share of Continental Baking's